

THE
LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:



EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.
REPORTED BY A. M. TALBOT,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. LVI—1928-1929.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,

AND

PRINTED BY W. SPEAGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E. C. 4.

1929.

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ERRATA.

Page 177, footnote(1), for "(1864) S.H.C.R. 94" read "1864, Suth. W. R. 94."

Page 209 Add, "Solicitor for respondents: *H. S. L. Polak*."

Page 265, footnote (1), for "28 I. A. 80" read "28 I. A. 121."

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DEPARTMENT OF LAW

LAW

UNIVERSITY OF KASHMIR

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23/4/5- 1-3-2009

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D. N. Srinivasan
ADVOCATE

CASES
IN
THE PRIVY COUNCIL
ON APPEAL FROM
The East Indies.

JUGGI LAL-KAMALAPAT (DEFENDANTS)	APPELLANTS;	
AND		J. C.*
SWADESHI MILLS COMPANY, LIMITED (PLAINTIFFS)	RESPONDENTS.	1928 Nov. 2.

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

Trade Mark—Passing off—Colourable Imitation—Deception of illiterate Persons—Trade Name associated with Mark—Damages.

The respondents dealt largely in Indian cloths, and in connection with sales thereof used a trade mark in which the lotus flower was the leading feature, and their cloths had become known as "lotus cloth." The appellants made and sold cloths upon which they used marks which would be apt to be confused with the respondents' mark by illiterate and unobservant people, and to be accepted by purchasers wishing to buy "lotus cloth." The respondents brought a suit against the appellants for passing off; they claimed damages, giving up a claim to an account of profits. The High Court held the appellants liable. In assessing damages the Court assumed that 60 per cent. of the sales made by the appellants of goods bearing the offending mark were due to the use of that mark, and awarded the respondents 9 per cent. of the sale price of that 60 per cent. as the profit thereon lost to the respondents:—

Held, that in the circumstances above stated the respondents' cause of action was established; but that the assumption made in assessing the damages was far too speculative. Though no definite rule could be laid down for estimating the damages in such a case it would be safer to award a sum representing the profit (at 9 per cent.) upon the falling

* Present: VISCOUNT DUNEDIN, LORD SHAW, LORD BLAINESBURGH, and SIR JOHN WALLIS.

J. C.
1928

—
JUGGI
LAL-
KAMALAPAT

—
v.
SWADESHI
MILLS CO.

off in the respondents' sales after the offending mark was used, together with a sum representing the profit upon an increase which might have taken place in their trade.

Johnston v. Orr-Ewing (1882) 7 App. Cas. 219 applied.

Judgment of the High Court I.L.R. 49 A. 92 varied as to damages.

APPEAL (No. 116 of 1927) from a judgment of the High Court (June 7, 1916) in a suit transferred to the extraordinary original jurisdiction of that Court from the Court of the Subordinate Judge of Cawnpore.

The respondents brought the present suit in the Court of the Subordinate Judge against the appellants alleging infringements of trade marks to which they had the exclusive right by user; they claimed an injunction, an account of profits, and other relief. They subsequently gave up their claim to an account, and claimed damages.

The suit was transferred to the High Court and was heard by Mears C.J. and Mukerji J.

The facts appear from the judgment of the Judicial Committee, and more fully from a report of the proceedings in the High Court at I.L.R. 49 A. 92.

Upon the grounds appearing in that report, the High Court held that the appellants were liable in damages, which were assessed in the manner appearing also in the present judgment.

1928. Oct. 30; Nov. 1, 2. *Sir Duncan Kerly K.C.*, *Sir George Lowndes K.C.*, *Wallach* and *F. E. Bray* for the appellants. The marks used by the appellants were not colourable imitations of the respondents' mark, nor likely to deceive purchasers. An exaggerated view of the illiteracy of retail buyers was taken. In any case the decree for damages should be set aside. There was no relevant or convincing evidence of any substantial damages. It could not properly be assumed that cloth sold by the appellants bearing the offending mark would have been sold by the respondents but for the use of the mark: *Leather Cloth Co. v. Hirschfield*(1); *Kinnell & Co. v. Ballantine & Sons.*(2)

W. A. Greene K.C., *Archer K.C.* and *E.B. Raikes* for the respondents. Applying the principles laid down in *Seixo v.*

(1) (1865) L.R. 1 Eq. 299.

(2) (1910) 27 R.P.C. 185.

Provizende(1) and *Johnston v. Orr-Ewing*(2) the evidence fully established an actionable passing off. The High Court were entitled on the evidence to draw the inference upon which they based the damages. The acts of the defendants were fraudulent, and *omnia praesumuntur contra spoliatorem*. The Court in no way misdirected itself; had the damages been awarded by a jury, the verdict would not have been assailable. The cases relied upon by the appellants are distinguishable upon their facts. [Reference was made also to *Boord & Son v. Bagots, Hutton & Co.*(3)]

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Sir *Duncan Kerly K.C.* replied.

The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is a case of the class which is generally known as a passing-off action.

The plaintiffs, who are the respondents before this Board, are a milling company who deal largely in Indian cloths, and who, in connection with the sale of that Indian cloth, use certain trade marks. In several of those trade marks, either in conjunction or alone, the lotus flower is the leading feature. Now their complaint is that the defendants, who are appellants before this Board, suddenly began to use trade marks which, though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant; and in particular did despite to them for this reason that their trade mark had really got to be associated with the name of "lotus," so that their cloth was known as "lotus cloth," and that a person coming and asking for "lotus cloth" might be satisfied by having cloth delivered with the trade mark of the defendants. That there may be deception, as one might phrase it, by sound as well as by sight was nowhere more forcibly insisted on than in the well known case of *Johnston v. Orr-Ewing*.(2)

(1) (1866) L.R. 1 Ch. 192.

(2) (1882) 7 App. Cas. 219.

(3) [1916] 2 A.C. 382.

J. C. The plaintiffs also claimed for an account of profits, but at the trial they gave up their claim for an account of profits and said that they wished instead to claim for damages.

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The trial took place before the High Court at Allahabad in its extraordinary original jurisdiction. That Court granted an injunction in respect of the trade marks and also it gave a large sum of damages—namely, Rs.172,800.

Their Lordships have no doubt whatsoever that the judgment of the Court was perfectly right as regards the injunction; they think the evidence was quite satisfactory to show that the plaintiffs' cloth was associated with the name of "lotus" and that any lotus device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer. There was perhaps a little difficulty as to one of the emblems, where the emblem on the defendants' trade mark, if looked at properly, was not a lotus but a rose. But there it was not only the question of the flower; there was a garter-like enclosure with a straight line beneath and the whole get-up of the one was so like the whole get-up of the other that their Lordships have no doubt that the Court below was right in making their injunction extend as it did.

When, however, their Lordships turn to the question of damages there is more difficulty. The plaintiffs came into Court with a demand for Rs.25,000 damages only, or such other sum as the Court might think fit. It seems, according to Indian practice, that they would not be bound down to the figure of Rs.25,000. When it came to the proof various figures were given, and the figure on which the learned judges below have proceeded was a figure which gave the sale account of the defendants' goods which had this, what may be called pirated mark upon them. The figure there brought out was, in round figures, Rs.3,200,000. What the learned judges then did was this: They said: "We will assume that of that Rs.3,200,000 worth of goods the defendants would have sold 40 per cent. if they had merely trusted to their own cloth without the addition of a misleading mark but 60 per cent. of it must be held to be due to the misleading mark"; and then, taking 60 per cent. of that Rs.3,200,000, they calculated

the figure of 9 per cent. of profit on that, and by that calculation they brought out the sum for which they gave judgment.

Their Lordships think that it is far too speculative an assumption to say that you could divide this figure up into the 60 per cent. and 40 per cent., and they cannot think that there is a justification for a decree founded upon that calculation.

When it comes to the question of what figure is to be substituted the question is not so easy because the matter is very much in the dark. If it had been before a jury it would have been disposed of in the rough and ready way in which juries do dispose of such questions by giving a figure which, if not absolutely out of all question, would have stood the test of any review by a Court of appeal.

Their Lordships cannot say that there is any cut and dried rule which can be laid down by a Court of law for the estimation of damages in a case like this, but think that on the figures given the safer figures on which to work are the figures which are given which show the falling-off in the respondents' trade which came in after this pirated mark was introduced on the market. If it is assumed that the whole of the falling-off was due to the use of the pirated mark that would bring out a figure of about Rs.1,000,000 loss of trade, and taking 9 per cent. profit on that amount it gives a figure which, put into pounds sterling, would come out at a sum of 4500*l.*(1). That, however, does not give anything for a possible increase of trade, and their Lordships think that on a rough calculation 500*l.* may be added for that, making 5000*l.*, but as the decree must be in rupees it is equivalent to Rs.67,000. Their Lordships therefore think that that is in this case the proper figure of damages.

As to costs their Lordships are of opinion that the decree as to costs in the Court below should stand and that there ought to be no costs before this Board.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court in appeal should be varied by substituting Rs.67,000 for the amount of the damages,

(1) An application is pending as to the figures.

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J. C. and that otherwise it should be affirmed and this appeal
1928 dismissed, but without costs.

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Solicitors for appellants: *Douglas Grant & Dold.*

Solicitors for respondents: *Lattey & Dawe.*

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Nov. 15. CHINNABBI REDDI (PLAINTIFF) AND } RESPONDENTS.
— OTHERS }

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law (Partition)—Property of Person outside joint Family—Alleged Agreement to treat Property as Joint—Purchases out of combined Properties—Onus of Proof.

Three brothers formed a joint Hindu family. A sister married a Christian who was in better circumstances than they were. He died in 1887 leaving a son (the appellant) then four years old. The appellant with his mother then went to live with his uncles, and from that time the uncles treated the property which the appellant inherited from his father, and the produce of it, in the same way as their own family property. In 1906 an outstanding half share in the ancestral property of the appellant's father was bought in the name of the appellant out of the produce of the combined properties, which was also applied from time to time to the purchase of other properties. In 1917 one of the three brothers sued for partition claiming a fourth share of the whole combined property. The suit was decreed on the ground that there was an implied agreement between the parties to share all the properties equally:—

Held, that the plaintiff was not entitled to share either in the property which the appellant inherited, or in that bought in his name. As to the former property the onus was upon the plaintiff to prove that he was entitled to share in it, and he had not discharged that onus. Any presumption arising by reason of the source of the money with which the latter property was bought was rebutted by the circumstances.

Judgment of the High Court varied.

APPEAL (No. 108 of 1926) from a judgment of the High Court (April 17, 1924) affirming a decree of the Subordinate Judge of Cuddapah, which affirmed a decree of the District Munsif.

* Present: LORD PHILLIMORE, LORD ATKIN, and SIR LANCELOT SANDERSON.

The suit giving rise to the appeal was brought in 1917 by the first respondent against his undivided brothers and his sister's son, the appellant. The plaintiff claimed a declaration that he and each of the defendants were entitled to a fourth share of properties which, in addition to properties of the joint family, included property which the appellant when a minor had inherited, and properties (one of which had been bought in the name of the appellant) bought out of the produce of the combined properties; he claimed a partition on that basis.

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The facts appear from the judgment of the Judicial Committee.

The Courts in India found in effect that there was an implied agreement that the whole property should be treated as the common property of all the four parties, and upon that basis decreed the suit.

1928. Oct. 22, 23. *Dunne K.C.* and *Narasimham* for the appellant. The onus was upon the plaintiff to prove that the appellant's property had ceased to be his exclusively. There cannot be implied from the circumstances an agreement to treat the whole property as if the four parties formed a joint Hindu family. The terms of s. 49 of the Indian Registration Act did not make the karar inadmissible for the collateral purpose of negativing any such agreement. In any case however no agreement by the appellant to give up his ancestral property can be implied. The true inference as to the property bought in his name is that it was intended to represent the produce from his own property.

De Gruyther K.C. and *Subba Row* for the first respondent. The karar was inadmissible for any purpose in the suit. There is nothing to prevent persons even if Christians from agreeing that they shall mutually have the same rights as if they formed a joint family: *Francis Ghosal v. Gabri Ghosal*.⁽¹⁾ From the circumstances such an agreement is to be inferred. The appellant came of age in 1901, and had since continued to live with his uncles as though a member of the joint family;

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he never demanded any account. The Courts in India have concurrently found that the facts showed an agreement to treat the whole property as the common property of the parties. The Board should regard these findings as conclusive. If there was no such agreement the rights of the parties are governed by s. 253 of the Indian Contract Act.

Narasimham replied.

Nov. 15. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from a judgment of the High Court of Madras affirming a judgment of the temporary Subordinate Judge of Cuddapah who affirmed a judgment of the District Munsif of Proddatur. The suit is brought by the plaintiff, a member of a joint undivided Hindu family, for partition. The defendants, so far as is relevant to the present issues, are his two brothers and the appellant Jogi Reddi. The question at issue is whether certain properties are, as the plaintiff affirms, joint family properties, or, as the appellant affirms, the separate property of the appellant.

Chinnabbi Reddi the plaintiff, Munir Reddi, and Chinnabali Reddi were brothers forming a joint Hindu family. They owned some 17 acres of land of poor quality and were poor folk. They had a sister, Sanjamma, who married Chinnaya, a Christian. The appellant, Jogi Reddi, is the only son of the marriage. Chinnaya was in better circumstances than his wife's family. He owned 24 acres of land apparently of good quality, part of it being represented by an undivided half interest in land of which the other half interest was owned by his brother. After his marriage, Chinnaya came to live in his wife's village. He died in 1887, when Jogi Reddi, the appellant, was about four years old, leaving the appellant the heir to his property. After his death, the mother and child went to live with the child's uncles. From that time onwards the uncles treated the minor's property in the same way as their own family property; they cultivated it and treated the produce as joint property. With their resources so reinforced they rose to comparative affluence. In 1901, Jogi Reddi attained his majority. The position remained

unchanged; the family fortunes increased: individual members adventured in road repairs, indigo, nut crushing, the proceeds going to a common fund. In 1906 the outstanding half interest in Chinnaya's ancestral property was bought for Rs.760 from his brother's son. It was, as the appellant affirms, bought for him out of his share of the proceeds of his land. It was certainly taken in his name. The purchase price was paid for out of the common fund: there appears to have been no other fund out of which it could be paid. In 1916, Chinnabbi Reddi became dissatisfied with the administration of the family affairs and claimed partition. In July, 1916, an agreement was come to between the parties and reduced into writing, whereby a partition was arranged. In that division, the lands claimed by Jogi Reddi as his own were excluded from division, and a grant of further lands was also made to him exclusively. The agreement was, unfortunately, not registered, and is, therefore, under the terms of the Registration Act, not available as evidence of the transaction. It has properly been rejected by all the Courts. The argument has been addressed to the Board that it is admissible as collateral evidence of the conduct of the parties. In the view their Lordships take of the case, they have found it unnecessary to express an opinion upon this point, and for the purposes of their decision have ignored the document.

What then are the rights of the plaintiff in respect of the property which Jogi Reddi as a minor inherited from his father? The subsequent acquisition of the undivided half can be dealt with separately.

In the first place, it is to be observed that the onus is upon the plaintiff to establish that the property is partible and that he has an interest. In the second place, it is agreed that the property in question is not, and never was, in the full sense, family property. It was originally the separate property of the Christian brother-in-law and afterwards of the Christian nephew of the plaintiff. Neither of them ever was or could become a member of a joint Hindu family. The rights of the Hindu family over the property must depend on some cession by the owner. Formal grant there was none, and the

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case turns, as the Courts below held, upon the contractual relations of the parties, to be inferred from all the circumstances. The peculiar circumstances have naturally caused some difficulty in formulating the plaintiff's case. The plaintiff in his plaint claims the property as part of the family property, undistinguishable from the original family ancestral property. The learned District Munsif points out that it may not be quite legal and correct to describe the suit as a suit for partition of family properties. "In one sense," he says, "it is such a suit and in another sense it partakes of the character of a suit for dissolution of partnership." He proceeds to point out that Jogi Reddi could not have acquired the ordinary joint interest in the joint family property carrying with it the right of survivorship. He concludes, therefore, that he and the members of the joint family constituted a sort of partnership, though not as joint owners, but as tenants in common. But obviously, this situation conflicts with the position of the brothers as members of the Hindu family. The learned Munsif solves the difficulty by concluding that "while Jogi Reddi was a tenant in common with the family as a separate entity, his rights being regulated by express or implied contract so far as the brothers were concerned, they were certainly joint tenants." The learned Subordinate Judge seems, however, to have treated the property as having become in the full sense family property. A convert, he says, "though not bound by the Hindu law may by his course of conduct show by what law he intends to be governed regarding his rights and interests and his powers over property. In the present case I have no doubt that the third defendant (the appellant) lived with his maternal uncles as a member of a Hindu family." The learned judges of the High Court, rejecting the suggestion of partnership, think that the combination of the family cannot be said to have gone beyond the mere stage of co-ownership; but they accept the finding of the lower Courts, which they state to be that all the properties were treated as the common property of the whole family, which necessarily implied an agreement between the members that they were all to share the properties alike.

This seems to ignore the difficulties pointed out by the learned Munsif as to the difference between the family relations as to the original family properties and the properties which descended from Chinnaya.

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Their Lordships would further observe that all the Courts below seem to have thrown the onus upon the appellant of proving that the properties he claimed were his own, instead of placing it, as it should be, upon the plaintiff. It therefore appears to their Lordships that there is no question of fact so found that can be binding upon an Appellate Court on a second appeal, and that it is necessary for them to consider what is the true position. They have come to the conclusion that the plaintiff has failed to make out that he is entitled to a share in the property, which the appellant inherited from his father. Admittedly, if the plaintiff acquired any interest in such property he did so by reason of some implied contract. For the first twelve or thirteen years of the association of uncles and nephew from which the contract is sought to be implied, the nephew was not of disposing capacity, and their Lordships see no reason for assuming that after he reached his majority, all other circumstances remaining the same, the necessary inference is that he made a gift to his uncles. The difficulties so clearly pointed out by the learned Munsif, of the difference between the tenure of the family ancestral property with the right of survivorship and the interest in Jogi Reddi's property with no right of survivorship, make the alleged gift the less likely. Their Lordships are not prepared to accept the view adopted apparently by the learned Munsif alone, in the Courts below, of a tenancy in common between the uncles as a family on the one side and the nephew on the other. The facts that the property was jointly cultivated and the proceeds of the produce pooled appear to be entirely consistent with the land itself remaining as it certainly did during the minority of Jogi Reddi his separate property. In the circumstances the purchase of the second half interest in the name of Jogi Reddi appears to bear out the notion of the original half interest being his; though if the property had otherwise been proved already to have become family

J. C. property, no particular importance would be attached to a
 1928 purchase in this form. This is not the case of an original
 member of a Hindu family becoming a convert, but electing
 to retain his interest in the family property on the old footing.
 JOGI REDDI Here a definite cession to a Hindu family of property which
 v. CHINNABBI originally did not belong to the family by a non-member
 REDDI. of the family who was a Christian has to be proved. And
 --- in their Lordships' opinion the plaintiff has not discharged
 the onus of proof.

This disposes of the plaintiff's claim to share in the property which descended to Jogi Reddi from his father. As has been intimated above, their Lordships are of opinion that the undivided half share purchased from Jogi Reddi's cousin and taken into his own name is not shown to be property of the joint family. The learned District Munsif took the view that as the source from which the consideration proceeded was joint income, the purchase must also be imprinted with that character. The argument undoubtedly deserves consideration, but the circumstance mentioned is not conclusive; and the facts that during Jogi Reddi's minority the rest of the family had undoubtedly received proportionately greater advantage from the minor's separate property, and the evidence that they desired to recognize this by acquiring the second half for Jogi Reddi himself appear to displace any such presumption as is relied on by the learned Munsif.

As to the balance of the immovable property and as to the movables, it is admitted that as the karar is unenforceable the plaintiff is entitled to a fourth share. This is consistent with the view, which their Lordships conceive to be correct, that the produce of the properties and services of the members of the family and Jogi Reddi was treated by all the parties as joint. Their Lordships were not asked to adjust any distribution that has already been decreed in this respect. Their Lordships are of opinion that the original decree should be varied on the footing that the properties included in list 1 of the third defendant's written statement filed on August 29, 1917, should be excluded from the properties in which the plaintiff is entitled to one-fourth share; and that the plaintiff

is entitled, excluding Jogi Reddi, to one-third of the ancestral property of the three brothers; and that the suit should be remitted to the High Court to give effect to their Lordships' judgment; and they will humbly advise His Majesty accordingly. The appellant should receive his costs from the plaintiff here and in the Courts below.

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Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondent No. 1: *Douglas Grant & Dold.*

YELLAPPA RAMAPPA AND OTHERS } APPELLANTS;
(DEFENDANTS) }
AND
TIPPANNA (PLAINTIFF) RESPONDENT.

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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Hindu Law—Partition—Presumption that Family continues Joint—Effect of Lapse of Time—Presumption rebutted by Facts—Exclusion from Joint Family—Indian Limitation Act (IX. of 1908), Sch. I., art. 127.

The strength of the presumption that a Hindu joint family continues to be joint necessarily varies in each case. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family the presumption becomes weaker and weaker.

In 1917 the respondent sued the appellants alleging that he was joint with them, and claiming a partition of police service lands in their joint possession. The respondent was a distant kinsman of the appellants, his great-great-grandfather being the common ancestor; he did not reside, worship, or mess with them. The appellants' branch had been in exclusive possession of the lands, paying the judi thereon, since 1862 when a claim to a joint interest had been resisted and no suit brought. Upon the death of the patil in 1882 there was no member of the appellants' branch available to fill the office, and the respondent was appointed at the widow's request. He had then alleged that he had a joint interest; but in 1895, when the first appellant, having then attained majority, was appointed to supersede him, he raised no objection or claim:—

Held, that having regard to the facts the presumption did not justify a finding that the respondent was a member of the joint family; further, that the facts also showed an exclusion to the knowledge of the respondent

* Present: LORD SHAW, LORD BLANESBURGH, and SIR JOHN WALLIS.

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for over twelve years so as to bar the suit under the Indian Limitation Act, 1908, Sch. I., art. 127.

Moro Vishvanath v. Ganesh (1865) 10 Bom. H. C. 444, 453 applied. Judgment of the High Court reversed.

APPEAL (No. 87 of 1926) from a decree of the High Court (February 29, 1924) reversing a decree of the Subordinate Judge of Belgaum.

The suit was brought by the respondent to recover a half share in the joint property of the appellants, who were his distant kinsmen, and for mesne profits.

The facts appear from the judgment of the Judicial Committee.

The trial judge held that the plaintiff was not a member of the joint family and dismissed the suit.

Upon appeal to the High Court a decree was made in the plaintiff's favour. The learned judges held that as the two branches of the family had once owned the property jointly, the burden was on the defendants to prove that the family had been divided, or to prove an exclusion of the plaintiff and his father to their knowledge, so as to bar the suit under the Indian Limitation Act, 1908, Sch. I., art. 127. In their view the evidence failed to establish either a partition or such an exclusion.

1928. Oct. 16, 18. *Sir George Lowndes K.C., E.B. Raikes* and *McNair* for the appellants. The burden of proving that the plaintiff was a member of the joint family was upon him, and he did not discharge it. Having regard to the circumstances of the case there was no such onus upon the defendants as justified the High Court in holding that the plaintiff was a member: *Moro Vishvanath v. Ganesh*.⁽¹⁾ Even if the onus was upon the defendants they discharged it. But the question of onus is really academic, as the evidence necessary to determine the question was before the Court: *Robins v. National Trust Co.*⁽²⁾; *Sivaprakasa v. Veerama Reddi*.⁽³⁾ In any case the suit was barred by the Indian Limitation Act, 1908, Sch. I., art. 127. There was an

(1) (1865) 10 Bom.H.C. 444, 453. (2) [1927] A.C. 515, 520.

(3) (1922) L.R. 49 I.A. 286, 303.

exclusion of the plaintiff to his knowledge in 1895, when the defendants' ancestor claimed the exclusive right to the office of patil, even if there was not an exclusion in 1862.

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The respondent did not appear.

Nov. 16. The judgment of their Lordships was delivered by

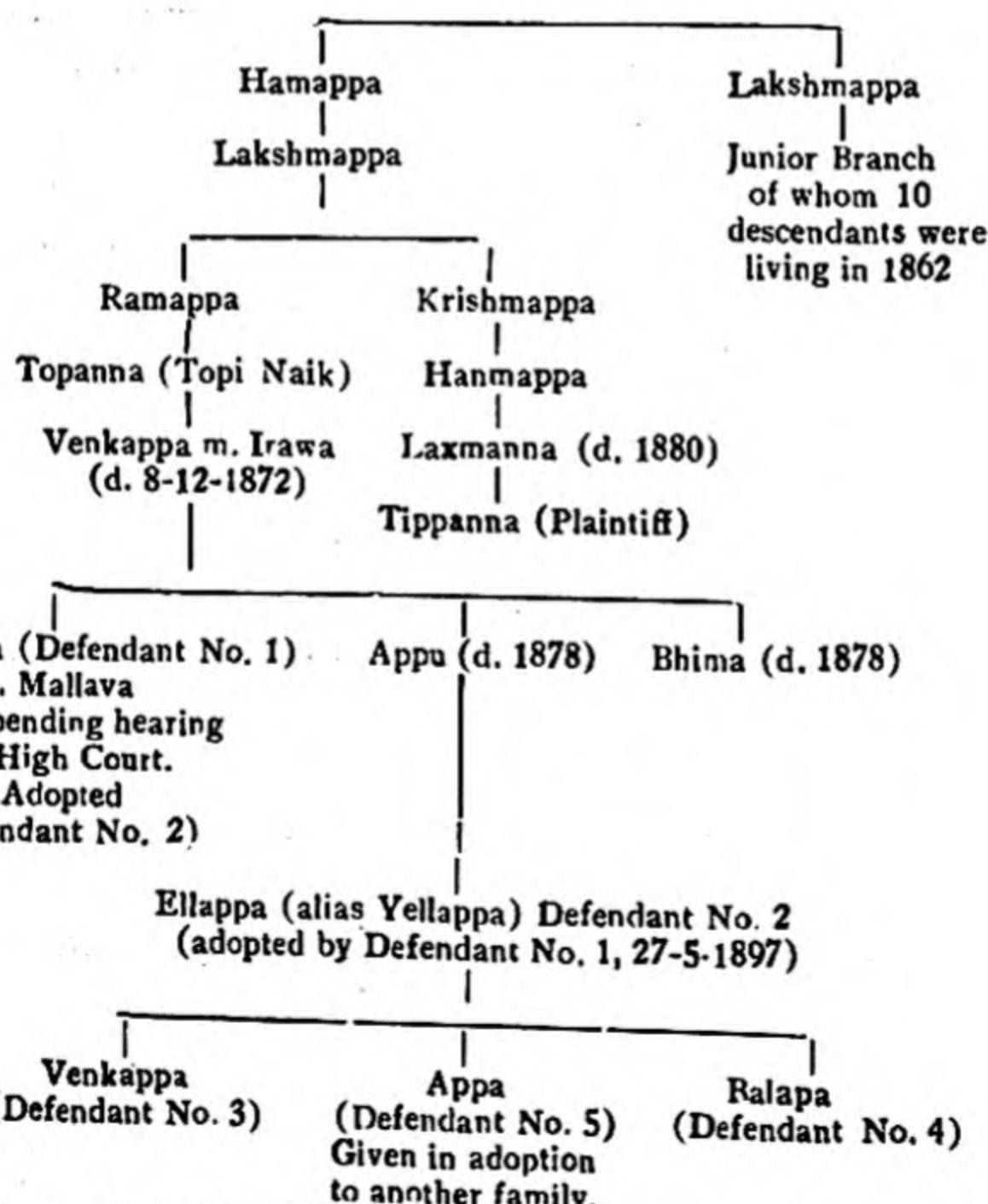
LORD SHAW. This is an appeal from a decree of the High Court of Judicature at Bombay. It was dated February 29, 1924, and it reversed a decree of the Court of the First Class Subordinate Judge of Belgaum dated August 28, 1919.

The suit was brought by the respondent for a half share in property possessed by the appellants for many years as after mentioned.

The appellants were distant kinsmen of the respondent.

The family genealogy is thus set out:—

Kenchi Hemi Naik



The suit was brought in 1916. The case was most carefully tried by the Subordinate Judge. One cannot peruse his

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judgment and the relative evidence without being struck by the accuracy and minuteness of his exposition and the apparent correctness of his conclusions.

Had the case been considered by the High Court as one to be determined merely upon the facts proved, their Lordships do not doubt that that Court would have reached the same conclusion as the Subordinate Judge. The High Court, however, in a brief deliverance, reversed the judgment substantially upon the ground of their view as to the onus probandi in allegations as to joint family property.

First as to the facts. Their Lordships agree in substance with the Subordinate Judge's narrative and only add this brief summary. The property is naiki watan (police service land) in the village of Manyal in the Kagwad State. It was annexed by the Government in 1858. The property being under attachment owing to a failure to pay judi or quit rent, a Government inquiry was ordered. That took place in 1862. There were rival claimants belonging to two branches of the family. The property, however, stood in the quit rent book as in the possession to the extent of 681 acres in the name of Venkappa, the father of the first defendant. Venkappa was the senior member of the senior branch of the family, treating, for the moment, the family of which Lakshmappa was the common ancestor as one branch. There was a junior branch, and one Yellappa stood in the quit rent book for the balance of 67 acres. Apart from the book the results of an inquiry held by the Mamlatdar was that so far as the whole property was concerned it was undoubtedly in Venkappa's possession, that he resisted the idea of there being any joint family interest in it or any other person with title thereto. In these circumstances, the year being 1862, the Government left it to anyone who so wished to bring a suit to establish their right.

No such suit was ever brought and no claim on behalf of the junior branch has ever since been made. The property remained in Venkappa's possession from that time, 1862, that is to say, 54 years before the present suit, until his, Venkappa's death. That event occurred in 1872—namely,

forty-four years before the suit—and from that time the successors of Venkappa reaching down to the present appellants have continued exclusively to possess the property, and pay the judi thereof.

On Venkappa's death a question arose as to who was to occupy the position of police patil. Venkappa had a family, the eldest of whom, Ramappa, was dumb. But there was a younger son, Bhima, who performed the service of police patil for him. During this period and until the death of Bhima in 1878, neither the plaintiff, Tippanna, nor his father Laxmanna, raised any objection to these proceedings or put forward any claim either to the property or to any office in connection therewith.

Thereafter, Irawa, the widow of Venkappa, applied in 1882 on behalf of the dumb son, Ramappa, for permission to appoint the police patil. In her petition she stated that in her house there were none who could do the work and she herself suggested the name of the plaintiff, Tippanna, for the office, describing him as one of her distant kinsmen, or baumgand; and it was in support of the claim so made for him, the date being 1882, that he alleged for the first time that he was a kinsman having a half share in the naiki watan.

This in truth is substantially the only connection of Tippanna with the idea of a joint family, or of any title to the property as a co-sharer thereof. His father, Laxmanna, had never in his life-time made any such claim. Whether the clause quoted was inserted in order to fortify the title of Tippanna to the widow's nomination of him as patil, or not, cannot now be decided. He or his advisers at all events must have thought that it was relevant to that appointment.

In 1894 the plaintiff's second term of appointment as patil expired. Irawa had died in the meantime. The successors of Venkappa's branch were quite willing that the plaintiff—distant relative though he was—should be continued as police patil. The position of the plaintiff was by this time quite clear. He himself gave his own description as a distant kinsman of the representative Wataidar. The contrast between that and the situation in 1882 was this, that in 1895

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he made no suggestion, as on the former occasion, that he had a half share of the property.

The Mamlatdar made an inquiry and he took his own line. Since the first appointment in 1872 the younger generation had grown up; and Yellappa of the Venkappa branch (being the adopted son of Ramappa, one of Venkappa's family) was appointed. The plaintiff in his statement shows that he consented to his own supersession and had no objection to Yellappa's appointment. This occurred in the year 1895, twenty-one years before the suit was brought.

It is a circumstance of note, as mentioned, that in these later transactions he made no representation of the suggestion that he had a half share in the property. Apart from these quasi administrative proceedings, there is no doubt cast upon the general point of possession of the property. Their Lordships do not enter into details, but they agree with the Subordinate Judge in holding that the plaintiff never did in fact possess or pay judi for any part thereof; and that he never was occupying the same house with the appellants and never was joint with them or their predecessors in food, in worship, or in estate. So far as the facts go, that is how, sketched in outline, they stand. On these facts—stated in full detail in his judgment—the Subordinate Judge was against the plaintiff's claim.

The judgment of the High Court is, however, to the effect that many years ago, at least three generations ago, it must be concluded that there was a joint family, and that in these circumstances the duty and onus lie upon the appellants who and whose ancestors have been in undisputed sole possession of the property for the long tract of time referred to, to establish that the "plaintiff's branch had been excluded to their knowledge for more than twelve years before the suit."

In the opinion of the Board this, which is the sole ground of the High Court's judgment, is an improper application and an undue stretch of the doctrine of onus probandi in such cases. In any case onus probandi applies to a situation in which the mind of the judge determining the suit is left in doubt as to the point on which side the balance should fall.

in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the judge to be blind to facts established before him, or, as in this case, to a whole category of facts extending over a long period of time and establishing the possession of property for generations as being in one line and not in two lines: see judgment delivered by Lord Dunedin in *Robinson v. National Trust Co.*(1)

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It is no doubt true that there is a presumption that a Hindu family continues joint, but the sound proposition has for many years been accepted that "the strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker." Thus properly cited by Mr. Mayne in his work on Hindu Law. The citation is from *Moro Vishvanath v. Ganesh*(2), which is now and has long been a leading and authoritative judgment. Their Lordships think it advisable to quote from it further the following statement of the law made by West J.: "The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu law, in the form in which it has come down to this generation, looks on all separation of families with disfavour."

(1) [1927] A.C. 515, 520.

(2) 10 Bom. H. C. 444, 453.

J. C. The proposition is indeed one which speaks for itself apart
 1928 from judicial authority. When it appears from facts that
 — YELLAPPA through generations a property has been possessed in a certain
 RAMAPPA single line, it can never be said that it lies upon that line to
 v. establish that it was dissociated generations ago from another
 TIPPANNA. line which appears on the scene as a claimant and propones
 — no facts of jointness, such as living in the same home, sharing
 in food or worship, or quoad estate participating in the enjoyment
 or fruits thereof. To put, in consequence of a stretch
 of the doctrine of onus, an unnatural and forced construction
 upon the actual facts of family life and development is
 not warranted either by the reason of the case or the law
 of India.

To apply these principles to the present case: The common ancestor was one Lakshmappa. He had two sons, Ramappa and Krishmappa. From the former (Ramappa) the defendants' family was descended; they are his grandsons and great-grandsons. The plaintiff family are descended from Krishmappa. The relationship between the plaintiff himself and the defendants is that he is their third or fourth cousin, he being the great-grandson of Krishmappa and the great-great-grandson of the common ancestor Lakshmappa. The idea that solely out of such circumstances there is some presumption of jointness in family, or—which is the true proposition—that a family originally joint has continued in jointness to this day, there being no other evidence of that, but on the contrary evidence of undisputed separate enjoyment, is not one which their Lordships can support.

Should such presumption be allowed to enter the case it would immediately be countered by the broad and undisputed facts as above sufficiently set forth.

It follows also from the above facts that the suit would be barred by the twelve years' limitation prescribed in art. 127 of the Indian Limitation Act, 1908.

The foundation of the High Court's judgment is therefore destroyed: and their Lordships see no reason to doubt that the judgment of the Subordinate Judge should be restored.

They will accordingly humbly advise His Majesty that the appeal should be sustained with the restoration as stated, and with costs thereafter and of this appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

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RAJA KEESARA VENKATAPPAYYA
(SINCE DECEASED), AND OTHERS (PLAINTIFFS) } APPELLANTS;

AND

RAJA NAYANI VENKATA RANGA
ROW (DEFENDANT) } RESPONDENT.

J. C.*

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Nov. 23.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Registration—Authority to adopt—Presentation for Registration—Representative of adoptive Son—Guardian—Natural Father—Indian Registration Act (III. of 1877), ss. 3, 32, 40, 41.

The provision in s. 40 of the Indian Registration Act, 1877, that an authority to adopt may be presented for registration, after the donor's death, by the donee or the adoptive son, does not exclude the authority, under s. 32, of the representative of the adoptive son to present the document. The definition of the representative of a minor in s. 3 does not preclude a person who is not his appointed guardian from being his representative.

An authority to adopt was presented for registration by the adoptive son's natural father, who was then his nearest male agnate, treating the son as having passed into the adoptive family. Registration was effected, the registering officer having satisfied himself, as required by s. 41, that the person presenting was entitled to do so according to s. 40, and it not having been objected that he was not so entitled:—

Held, that the document was duly registered, since the natural father, as the adoptive son's nearest male agnate, was the proper person to act as his natural guardian in the absence of any guardian judicially appointed; further, that any doubt upon the facts was removed by the certificate of the registering officer.

Quaere, whether in the case of an adoptive son of tender years residing with his natural father, the natural father is not, in the absence of a guardian, his representative, even when he is not his nearest male agnate in Hindu law.

Decree of the High Court, I.L.R. 43 M. 288 affirmed.

* Present: LORD PHILLIMORE, LORD ATKIN, and SIR LANCELOT SANDERSON.

J. C. CONSOLIDATED APPEALS (Nos. 12 and 13, of 1925) from
 1928 two decrees of the High Court (May 1, 1919), affirming two
 decrees of the District Court of Kistna at Masulipatam.

**VENKATAP-
 PAYYA** The consolidated appeals arose out of two suits which
**v.
 VENKATA
 RANGA ROW.** related to the right of succession to the zamindari of Munagala
 in the Kistna District.

Various questions of fact and of law arose in the suits, but the only question material to the present report was whether an authority to adopt which had been exercised in favour of the respondent to both the appeals, and had been presented for registration under the Indian Registration Act, 1877, by the respondent's natural father, had been duly presented.

The facts giving rise to the litigation, and the material sections of the above Act, appear from the judgment of the Judicial Committee.

The judgment of the High Court is reported at I. L. R. 43 M. 288.

1928. Oct. 16, 18. *Dunne K.C.* and *Parikh* for the appellants. The authority to adopt was not validly presented for registration under the Registration Act, 1877. Sects. 40 and 41 contain special provisions as to the presentation of a will or authority to adopt, and these provisions exclude those in s. 32, which enable the presentation to be by the representative of a person claiming under the document. Further, s. 3 of the Act indicates that the "representative" of a minor is his guardian. The respondent's natural father was not his guardian, and was not a person entitled to present the document: *Ambar v. Shrinivasa Kamathi.*(1)

Upjohn K.C., *De Gruyther K.C.*, *Narasimham* and *Appa Row* for the respondent. Sects. 40 and 41 do not exclude the power given to a representative to present by s. 32. Sects. 40 and 41 were necessary supplemental provisions to provide for documents taking effect at a date later than their execution. If s. 32 were excluded a testator could not present his will by an agent under a power of attorney. The words

"and any other person entitled to present it" in s. 41 clearly include persons entitled under s. 32. The respondent's natural father was his natural guardian. Giving effect to the Hindu law of adoption he was after the adoption the respondent's nearest agnate. Sect. 3 provides merely that a minor's representative "includes" his guardian. The natural father was the proper person to take all steps necessary to enforce the respondent's rights of succession: *Nirvanaya v. Nirvanaya*(1); *Watson & Co. v. Sham Lal Mitter*.(2) [Reference was made also to the Guardian and Wards Act, 1890, s. 4, sub-s. 2.]

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Dunne K.C. replied.

Nov. 23. The judgment of their Lordships was delivered by LORD PHILLIMORE. These are two consolidated appeals in two suits both brought so long ago as the year 1895, being claims to the zamindari of Munagala in the Kistna District. They arose in the following circumstances:—

Kodanda Ramayya, who was zamindar, died in the year 1854. He left no son; but his mother, his widow, and a daughter by her named Latchamma, survived him. She married a subject of the Nizam of Hyderabad, who died in 1875. Her husband was said to have given his wife an authority to adopt a son, and it was asserted on behalf of the present respondent, Nayani Venkata, that he had been so adopted. The Court of Wards took possession of the estate on behalf of the women, and it was enjoyed by them, not without question, until the death of Latchamma, in March, 1892.

Thereupon disputes arose, and various members of the Keesara family, who were agnates of the last male zamindar, claimed that the estate was an ordinary Hindu estate owned by a joint Hindu family, further saying that the present respondent had no title as an adopted son, there neither having been any authority to adopt nor any adoption in fact. The defence set up a custom of impartibility and descent by

J. C. lineal primogeniture and the title by adoption, and further
 1928 pleaded the Limitation Act.

VENKATAP- The District Judge, in a very careful judgment, found
PAYYA that the estate was an imitable one, and that the plaintiffs'
_{v.} claim was ill founded, resting largely upon forged documents;
VENKATA and he dismissed this suit, which though first in time is second
RANGA ROW. under the order consolidating these appeals. The District
_— Judge further held that the defence of the Limitation Act,
 if it was required, would have been a sufficient answer to
 the suit.

On appeal, the High Court affirmed this judgment. Both judges held in express terms that the case of the plaintiffs had not been established. The Chief Justice further held that the defence of the Limitation Act was good. The other judge did not find it necessary to express an opinion on the point.

When the matter came before their Lordships, counsel for the appellants in the first suit found himself unable to resist the conclusion that the decisions in India had turned upon matters of fact upon which there were concurrent findings in both Courts, and he was unable to take this case out of the ordinary rule of this Board, refusing to interfere, except in very special cases, with decisions turning on concurrent findings of fact. It was clear, therefore, that this appeal must fail.

In the second suit, first in the consolidation order, one of the Keesara agnates purported to accept the position that the estate was by custom an imitable estate. He did not, however, accept the further proposition that it descended by lineal primogeniture. He claimed that he was the nearest reversionary heir, excluding the respondent, whose adoption he contested. The defence denied the plaintiff's title, set up the adoption, and pleaded the Limitation Act. When the case came before the District Judge he decided in favour of the respondent on all grounds. He held that the estate descended by lineal primogeniture, and that if this was the case, the plaintiff was not the next heir, even if there were no adoption. He further held in favour of the adoption and the defence of the Limitation Act.

When the case came before the High Court the decision was affirmed, and the appeal was dismissed. The learned judges of the High Court do not appear to have considered the question whether the plaintiff was, if the adopted son were excluded, the nearest reversionary heir. But the conclusions at which they had arrived in the former suit were sufficient for dismissing the suit also, and accordingly both appeals were dismissed on May 1, 1919.

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Here, their Lordships must pause to comment upon the lamentable delay which has taken place. These suits, as already observed, were both started in the year 1895 in respect of claims which, if well founded, would have accrued in 1892. It is true that some of the delay is to be accounted for by the fact that when the cases first came before the District Judge, he attempted to deal with them by a short cut, deciding in favour of the respondent on May 21, 1904, and that time was consumed in the appeal from these orders and the consequent remand. But he gave his second judgment on April 14, 1914, and it has taken till now to bring the matter before their Lordships. Some delays are to be accounted for by the fact that in the agnates' suit there were very many plaintiffs, and that all of them except the one plaintiff were made defendants in the other suit; and that from time to time deaths occurred, and that new parties had to be added by way of revivor or of supplement.

But, even so, the delays are discreditable.

Now with regard to the second appeal. It was rightly contended by counsel for the respondent that before any inquiry was made into his client's title the plaintiff had to prove his own title, and that upon the holding of the District Judge, which he was prepared to support, the plaintiff had in any event no title. So far as this line of defence was indicated, it seemed to their Lordships not unlikely that it would succeed. But as it also seemed to their Lordships that the grounds on which the High Court decided might be sufficient, and that the conclusions arrived at in the first suit as to the imparibility of the estate and its descent by lineal primogeniture, must also be accepted in this second

J. C. 1928 suit, they proceeded to hear the argument upon the question of adoption.

VENKATAP-
PAYYA
VENKATA
RANGA ROW. Now this was attacked in three ways. First of all it was said that Latchamma had never adopted; secondly, that her husband had never given her authority to adopt; and thirdly, that the alleged written authority to adopt, on which reliance was placed, could not be looked at, as it had not been registered in British India as required by the Registration Act.

Several of these points turn on questions of fact. Both Courts found that Latchamma had adopted the respondent. Both found that there was no oral authority from her husband, but both found that the written authority, if it could be looked at, was genuine. Then came the questions under the Registration Act, and here again one of these questions also turned upon fact, and so turning, was again found in favour of the respondent, and upon none of these questions of fact has any reason been shown to their Lordships for not accepting the concurrent findings.

The Indian Registration Act, 1877, provides by s. 17 that an authority to adopt not conferred by a will shall be registered, and by s. 25 that any document requiring registration which has been executed outside British India, shall be presented for registration within four months after its arrival in British India, and by s. 49 that no document required by s. 17 to be registered shall be received in evidence unless registered in accordance with the Act.

It was contended for this appellant that Latchamma, who had left Hyderabad after her husband's death, and come to reside at her old home, had brought the document with her into British India, more than four months before she presented it for registration. This issue of fact, if it was open after the decision of the registrar, was found in favour of the respondent.

The one question that then remained was whether the document, which was in fact registered, had been duly presented as required by the Act.

The sections which relate to this matter are the following:—

32. “Except in the cases mentioned in s. 31 and s. 89, every document to be registered under this Act, whether such

registration be compulsory or optional, shall be presented at the proper registration office, J. C.
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“ by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

“ or by the representative or assign of such person,

“ or by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned.”

40. “The testator, or after his death any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration,

“ and the donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration.”

41. “A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.

“ A will or authority to adopt presented for registration by any other person entitled to present it, shall be registered if the registering officer is satisfied,

“ (a) that the will or authority was executed by the testator or donor, as the case may be;

“ (b) that the testator or donor is dead; and

“ (c) that the person presenting the will or authority is, under s. 40, entitled to present the same.”

Now the authority to adopt was presented to the registrar on August 20, 1892, by Nayani Raghara Reddi, who describes himself as natural father and guardian of the minor. The registrar examined witnesses, and came to the following conclusions: “From the depositions of the above said witnesses I have satisfied myself with respect to the matters mentioned herein below: (1.) That this document was executed and given by the person who purports to have executed and given it. (2.) That the executant is dead. (3.) That the person who presented this document has authority according to s. 40 of the Registration Act to present the same.” And thereupon he registered the document.

J. C. The contention is that the person presenting was, though
 1928 the registrar had accepted him, nevertheless not the person
 — VENKATAP- who could lawfully present under the terms of the Act. The
 PAYYA argument took this shape. First, that s. 40 excludes the
 — VENKATA provisions of s. 32 and limits the persons entitled to present
 RANGA Row, for registration an authority to adopt, to the actual donor
 — if living, and to the donee and the adopted son after the
 donor's death, and that it will not do to have it presented
 by the representative of the adopted son.

Their Lordships do not take this view. They agree with the learned judges in the Court below, and on this particular point they would specially refer to the judgment of the second judge in the High Court, Sadasiva Aiyar J.

Sect. 40 is intended for the case of what may be called ambulatory documents, documents which can be revoked at any moment, and which will have no binding effect till the death of the executant, and to that extent they are taken out of s. 32. An intended executor, legatee or donee of a power might possibly under s. 32 be considered as a person claiming under the instrument. But he is not to be allowed to present a document for registration while it is still capable of revocation. On the other hand, the class of persons who after death may claim to register is defined, and it may be said expanded. It is not merely the executor but also the legatee. It is not merely the donee of the power to adopt, but also the person claiming to have been adopted. These are the principals. Then given the principals, s. 32 introduces certain agents who can take the place of principals, and one of these agents is the representative of a person claiming under the document. Now the word "representative" is defined in s. 3 as including the guardian of a minor. Here the person presenting describes himself as being the natural father and guardian. It is said that when adoption has once taken place, the adopted child is removed wholly out of his natural family, and that his natural father has no longer a legal relation to him. This may be taken to be the case; but what is to happen when a child of tender years, as was the case here, is actually residing with his natural

father, and has no appointed guardian. When one remembers that the definition of "representative" does not make it equal to guardian, but says that it includes guardian, might it not well be said that in these circumstances and in the absence of any legally appointed guardian the natural father was the representative?

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VENKATA
RANGA ROW.
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However, it is not necessary to decide this. It appears that, as so often happens, the adoption was of a child of the same family, and that if the child be taken as having entered into his adoptive father's family, the natural father was nevertheless the nearest male agnate, and the proper person to be appointed guardian, and the proper person to act as natural guardian in the absence of any judicial appointment. If there were any doubt upon these facts, it might further be observed that, by s. 41, the registrar is made the judge whether the person presenting the authority is entitled to present it, and though objection was raised on behalf of this appellant to the registration on the ground that it was out of time, no similar objection was raised as to the propriety of the person presenting.

If this conclusion be arrived at, it is as unnecessary to enter upon the defence of the Limitation Act as it is upon the question of the plaintiff's title. Neither is it necessary to discuss the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, can rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption.

Upon the whole matter their Lordships will humbly advise His Majesty that both appeals fail, and should be dismissed with costs.

In 1913 a petition by the respondent was before the Board, applying for special leave to appeal from the orders remanding the suits. The Board did not feel able to advise that special leave to appeal should be granted from interlocutory orders, so their Lordships directed the petition to stand over

J. C. generally until the proceedings on the merits in the Courts
 1928 below had terminated, and they intimated that the costs of
 — that application ought to be costs in the suits. As no order
VENKATAP. has been made in the Courts below as to these costs, it remains
PAYYA for their Lordships to advise that these costs should be
 v. included by the respondent in his costs of these appeals,
VENKATA RANGA ROW. which the appellants will pay. As the petitioner has been
 — successful in these appeals his petition has no further object,
 and should be dismissed.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas Grant & Dold.*

Solicitors for respondent: *T. L. Wilson & Co.*

J. C. PRAKASH SINGH (JUDGMENT-DEBTOR) . APPELLANT;
 1928 AND
 — ALLAHABAD BANK, LIMITED } RESPONDENTS.
 Nov. 23. (DECREE-HOLDER) }

ON APPEAL FROM THE CHIEF COURT OF OUDH.

Execution of Decree—Decree-holder certifying Payments—Limitation—“Application”—Certification when Execution barred but for Payments certified—Indian Limitation Act (IX. of 1908), Sch. I., art. 181—Code of Civil Procedure (Act V. of 1908), Order xxi., r. 2 (1).

Certification to the Court under Order xxi., r. 2 (1.), by a decree-holder of a payment made to him out of Court, even if made in the form of an application, is not an “application” within art. 181 of the Limitation Act so as to be barred unless it takes place within three years of the payment certified; nor is there any article which limits the time. Further, certification under r. 2 (1.), can take place when execution of the decree is barred but for the payment certified.

Pandurang v. Jagya (1920) I. L. R. 45 B. 91; *Jalim Chand Patwari v. Yusuf Chowdhuri* (1924) I.L.R. 54 C. 143; and *Joti Prasad v. Srichand* (1928) 26 All. L. J. 966 approved.

Judgment of the Chief Court affirmed.

APPEAL (No. 21 of 1928) from a decree of the Chief Court of Oudh (October 4, 1926) affirming an order of the Subordinate Judge of Sitapur.

* Present: LORD PHILLIMORE, LORD ATKIN, and SIR LANCELOT SANDERSON.

DEPARTMENT OF LAW

T. B. R. - V

UNIVERSITY OF BIRMINGHAM

On February 14, 1925, the respondent applied to the Court of the Subordinate Judge for leave to execute a decree of that Court dated December 4, 1916. The question upon the present appeal was whether the application was barred by limitation.

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BANK, LTD.

The decree was in the terms of a compromise made in a suit brought by the respondent against the appellant upon two mortgages. The material terms of the decree appear from the present judgment. Shortly stated it provided for payments by instalments, and that if at any time there was a shortage of Rs.60,000 in payment of the instalments, then the decree could be executed for the whole amount remaining due. On March 14, 1917, the respondents certified to the Court under Order xxi., r. 2 (1.), a payment of Rs.40,000. On December 8, 1924, they filed a document described therein as an application under the above rule; it certified payments amounting to over 8 lakhs at varies dates; these payments included payments at dates between November 14, 1916, and October 26, 1923. If these payments, or such of them as were not made within three years of December 8, 1924, were ignored, the respondents could have executed the decree according to its terms at a date more than three years before the application, and accordingly execution was barred under the Indian Limitation Act, 1908, Sch. I., art. 181 or art. 182 (1.). If, on the other hand, the payments so certified were to be taken into account the decree could not have been executed before April, 1922, and the application was not so barred.

The Subordinate Judge held that the certification was not barred as an "application" within art. 181 or otherwise, that the recorded payments had been made, and that they prevented the application to execute being barred. He further held that certain letters were acknowledgments, which prevented the application to execute from being barred. Accordingly he made an order for execution.

Upon appeal to the Chief Court the order was affirmed. The learned judges (Stuart C.J. and Muhammad Raza J.) agreed with the view of the Subordinate Judge upon the

J. C. first point, and therefore did not consider the alleged acknowledgments. The judgment is reported at I. L. R. 1 Luck. 482.
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~~PRAKASH SINGH v. ALLAHABAD BANK, LTD.~~ 1928. Oct. 23, 25. W. A. *Greene K.C.*, *Jopling* and *Kustomji* for the appellants. Order xxi., r. 2 (3.), precluded the Court from recognizing payments which were not duly certified under r. 2 (1.). Consequently, having regard to the terms of the decree the application to execute it was barred under arts. 181 and 182 (1.) of the Limitation Act, unless the certification on December 8, 1924, was valid. The certification of the material payments was invalid for two reasons. First, because certification under Order xxi., r. 2 (1.), is an "application" within art. 181, and therefore is barred if made more than three years after the payment. Secondly, because it was made when execution of the decree was already barred but for payments then sought to be certified. There is no ground for holding that a decree-holder certifying to the Court is not thereby making an application. In the present case the document was in the form of an application, and was so described. The rule of the Oudh Court that a "formal application" is not necessary does not affect the matter. Several cases in India have decided that a decree-holder in certifying has made an "application" to take a step in aid of execution within art. 182 (5.), e.g., *Narain Das v. Balgobind*(1); *Maung Law San v. Maung Po Thein*.(2) On the second ground: when the certification took place the decree was dead for purposes of execution; there could not be a certification so as to resuscitate it. A right once barred by limitation cannot be revived. There have been decisions in India both ways on the questions raised. The appellant is supported by *Bahuballabh Roy v. Jogesh Chandra Banerjee*(3); *Bahy Saha v. Aijanmai*(4); *Jatindra Kumar Das v. Gagan Chandra Pal*(5); *Maung Law San v. Maung Po Thein*(2); and *Baij Nath v. Panna Lal*.(6) It is conceded that there are more recent decisions to the contrary effect.

(1) (1911) I.L.R. 33 A. 528.

(4) (1921) 26 Cal.W.N. 529.

(2) (1924) I.L.R. 2 R. 393.

(5) (1918) I.L.R. 46 C. 22, 24.

(3) (1918) 23 Cal. W. N. 320.

(6) (1924) I.L.R. 46 A. 635, 637.

[Their Lordships directed that argument upon the question of acknowledgment should be postponed.]

De Gruyther K.C. and *Wallach* for the respondents. Certification by a decree-holder under Order xxi., r. 2 (1.), is not an "application" within the meaning of art. 181 of the Limitation Act. The rule draws a distinction between the act of certification under r. 2 (1.), and the "application" which by r. 2 (2.) the debtor may make. The limitation imposed upon the debtor by art. 174 is inconsistent with certification under r. 2 (1.), being an "application" under art. 181. A decree-holder certifying under r. 2 (1.) is not "applying" to the Court to adjudge or direct as to any matter. Certification being a matter of procedure was governed in this case by the local rule of Court. It is not material that it was worded like an application. There is no limit of time for a certification under Order xxi., r. 1. Execution was prevented from being barred at the date of certification by the payments. Certification, or the absence of certification, of the payments went only to the proof of the payments. The weight of authority in India upon both questions raised is now conclusively in favour of the respondents: *Tukaram v. Babaji*(1); *Pandurang v. Jagya*(2); *Roshan Singh v. Mata Din*(3); *Amar Singh v. Ram Dei*(4); *Masilamani Mudaliar v. Sethuswami Ayyar*(5); *Jalim Chand Patwari v. Yusuf Ali Chowdhuri*(6); *Joti Prasad v. Srichand*(7)

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Jopling replied.

Nov. 23. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. By an order of His Majesty in Council dated April 22, 1927, special leave was granted to the appellant Raja Shri Prakash Singh to appeal against the decree of the Chief Court of Oudh dated October 4, 1926.

The facts relevant to the appeal are as follows:—

By two mortgage deeds, one dated March 24, 1911, to secure the sum of Rs.3,50,000 and interest and the other,

(1) (1895) I.L.R. 21 B. 122.	(4) (1925) I.L.R. 47 A. 873.
(2) (1920) I.L.R. 45 B. 91.	(5) (1916) I.L.R. 41 M. 251.
(3) (1903) I.L.R. 26 A. 36.	(6) (1924) I.L.R. 54 C. 143.
(7) (1928) 26 All. L. J. 966.	

J. C. dated March 20, 1913, to secure the sum of Rs.12,00,000
 1928 and interest, certain property now belonging to the appellant
 — was mortgaged to the respondents. In the year 1916 the
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dated March 20, 1913, to secure the sum of Rs.12,00,000 and interest, certain property now belonging to the appellant was mortgaged to the respondents. In the year 1916 the respondents brought a suit in the Court of the Subordinate Judge of Sitapur to recover the amount due on these two mortgages and future interest against Raja Debi Prakash Singh (the father of the appellant since deceased) and the appellant; and on December 4, 1916, a decree was passed in the terms of a compromise made between the parties.

By the said compromise it was agreed that a sum of Rs.16,67,049-12-6 was due under the said mortgages including interest and costs, and it was provided that out of the aforesaid sum the sum of Rs.3,754-0-0 for costs was to be paid within a week (and this was done), and that the sum of Rs.16,63,295-12-6 which after payment of costs would remain due was to be paid by instalments of Rs.60,000 (to be paid on each April 30, of the years 1917 to 1922 inclusive), and of Rs.80,000 (to be paid on each October 31, of the years 1917 to 1921 inclusive), and that the whole of the balance with interest as therein provided was to be paid on October 31, 1922, and that the respondents should be entitled to take out execution for the whole amount as might then be due under the decree by annulment of instalments, and to recover the same by sale of the mortgaged property in three cases, one of which was stated as follows: "If the instalments are only partly paid and the total shortage in the payment of any instalment or instalments owing to such part payment amount to Rs.60,000 or in other words, so long as the total unpaid amount of instalment or instalments is below Rs.60,000 the bank" (that is the respondents) "will not acquire right to execute the decree but it will acquire right to execute as soon as the arrears amount to Rs.60,000."

It was also provided that in the event of the respondents having to execute their decree under the contingencies therein above mentioned, it should be open to the respondents to execute the decree without applying for and obtaining a decree absolute or final decree for the sale of the mortgaged properties.

On March 14, 1917, the respondents certified to the Court of the learned Subordinate Judge, payments by the judgment-debtors, i.e., by the appellant and his father amounting to Rs.40,000 and such payments were duly recorded. Further payments were made from time to time by the judgment-debtors to the respondents out of Court, the date of the last payment being October 26, 1923. It was agreed by the learned counsel for the appellant that the total amount of unpaid instalments was below Rs.60,000 until April, 1922; in other words that the arrears of instalments for the first time amounted to Rs.60,000 in April, 1922.

With the exception of the Rs.40,000 already mentioned, the respondents did not certify to the Court any of the aforesaid payments until December 8, 1924. On that date a document was filed on behalf of the respondents in the Court of the learned Subordinate Judge. It was headed "Application under Order xxi., r. 2, C.P.C.," and was as follows:—

"The humble petition of Allahabad Bank Limited, Lucknow Branch, plaintiff decree-holder most respectfully sheweth:—

1. That on December 4, 1916, a decree for Rs.16,63,295-12-6 was passed against defendant No. 1 now dead and represented by defendant No. 2 and defendant No. 2 Kunwar Sri Prakash Singh to be paid according to the instalments mentioned in paragraph 3 of the compromise filed on behalf of the defendants and accepted by the plaintiff's pleader and agent on November 10, 1916, with interest at Rs.7-8 per cent. per annum.

2. That under the compromise and the decree, it was provided that the decree shall stand as a decree for sale of the mortgaged property specified in the schedules A and B attached to the decree and the compromise.

3. That the bank decree-holder has received Rs.8,30,316-8 in part satisfaction of the aforesaid decree on different dates as per statement of decree account attached to this application.

4. That the bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order xxi., r. 2 (1.) of the C.P.C."

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J. C. The statement of decree account which was attached to
 1928 the said document, set out the various payments, the last
 PRAKASH payment, as already stated, being under date October 26, 1923.
 SINGH
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 ALLAHABAD The learned Subordinate Judge on December 8, 1924,
 BANK, LD. recorded the said payments; no notice of this proceeding
 was given to the appellant, who at that time was the sole
 judgment-debtor, his father having died.

On February 14, 1925, the respondents applied to the Court of the learned Subordinate Judge for execution of the decree, praying that Rs.17,39,110-1-1 with interest as mentioned in the application should be realised by sale of the mortgaged property.

The appellant filed written objections on May 23, 1925, and raised further objections at the hearing.

The learned Subordinate Judge framed the following issues: (1.) Is the execution application within time? (2.) Whether the certification and the recording of payments are invalid and barred by time? (3.) Whether amount claimed is correct?

On May 15, 1926, the learned Subordinate Judge dismissed the appellant's objections, his findings on the issues being against the appellant except in respect of certain sums wrongly claimed in respect of interest, which he directed should be rectified.

The appellant appealed to the Chief Court of Oudh at Lucknow against the order of the learned Subordinate Judge and on October 4, 1926, the learned judges of the Chief Court dismissed the appeal. The learned judges, in their judgment, stated that the position taken up by the appellant was to the effect that: "Although the bank applied for execution within three years of the first date when execution was permitted under the terms of the decree, in view of the circumstance that the judgment-debtor had made sufficient payments in satisfaction of the instalments, the application for the execution is nevertheless time-barred, and the decree-holder is left without remedy in respect of the balance due. His learned counsel has argued in support of this proposition upon three main points. He has argued that in the first

place the Court cannot recognize any payments or adjustments after March 14th, 1917, on the plea that no certification can be accepted by a Court unless it has been made within three years of the date of satisfaction. His second point is that on the date of the second certification, December 8, 1924, the decree had automatically become time-barred, inasmuch as there had been no certification between March 14, 1917, and December 8, 1924. His third point is that the decision of the trial Court to the effect that there had been acknowledgments in writing by the judgment-debtor which saved limitation, is incorrect.

The learned judges held that a certification of payments by the decree-holder under the provision of Order xxi., r. 2 (1.), of the first schedule to the Code of Civil Procedure of 1908 was not an application within the meaning of art. 181 of the Indian Limitation Act of 1908, on which the appellant had based his argument, and consequently, that the application for execution was not time-barred. The learned judges, relying on these findings, dismissed the appeal and did not decide the third point which related to the alleged acknowledgments in writing by the judgment-debtor.

The argument presented to the Board on behalf of the appellant was to the effect that a document filed by the decree-holder certifying a payment made out of Court under the provisions of Order xxi., r. 2 (1.), aforesaid, is an application within the meaning of art. 181 of the Indian Limitation Act, and that it must be presented to the Court within three years of the date when the payment which it is desired to certify was made.

It was further argued that an application by the decree-holder under the aforesaid rule cannot be made at a time when, but for the payments sought to be recorded, the statute would have run and the right to execute the decree would be time-barred. On this basis it was argued that in this case the Court ought not to have recognized any payments made after March 14, 1917, on which date the payment of Rs.40,000 was certified and recorded, and that on December 8, 1924, the decree, dated December 4, 1916, had become time-barred

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J. C. as there was no certification of payments by the decree-holder between March 14, 1917, and December 8, 1924.
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PRAKASH SINGH On the other hand, it was argued on behalf of the respondents that it was not necessary for the decree-holder to make a formal application when certifying a payment out of Court under Order xxi., r. 2 (1.), that the certification of payments made by the respondents under the said rule was not an application within art. 181 of the Indian Limitation

ALLAHABAD v. BANK, LTD. **A**ct, and that there is no statutory period within which the decree-holder must certify to the Court a payment made to him by the judgment-debtor out of Court. Reliance was placed upon r. 168 of the Oudh Civil Digest and the form referred to in the said rule, and it was contended that the terms of the said rule showed that the contention of the respondents was correct.

It was further argued on behalf of the respondents that they had no right to apply for execution until April, 1922, by reason of the payments made by the judgment-debtor, that such payments had been certified by them to the Court, that the Court had recorded the payments, and therefore that the application for execution of the decree was made within time.

Many decisions of the Courts in India were cited to their Lordships, and it is apparent from a consideration thereof that at one time there was a difference of opinion among the learned judges who dealt with the matter. Their Lordships do not think it necessary to refer in detail to the cited cases; it is sufficient to say that in their opinion the weight of authority, especially in the later decisions, seems to be in favour of the contention of the respondents—as, for instance, *Pandurang v. Jagya*(1); *Jalim Chand Patwari v. Yusuf Ali Chowdhuri*(2); and *Joti Prasad v. Srichand*.(3)

It is necessary, therefore, to consider whether the document filed by the respondents in the Court of the learned Sub-ordinate Judge on December 8, 1924, was an application within the meaning of art. 181.

(1) I. L. R. 45 B. 91.

(2) I.L.R. 54 C. 143.

(3) 26 All. L. J. 966.

Order xxi., r. 1 (1.), is as follows:—

“ (1.) All money payable under a decree shall be paid as follows, namely:—

- (a) into the Court whose duty it is to execute the decree; or
- (b) out of Court to the decree-holder; or
- (c) otherwise as the Court which made the decree directs.”

Order xxi., r. 2, has three sub-rules, and they provide as follows: “ (1.) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

“ (2.) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

“ (3.) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.”

The terms of r. 2 (1.) do not provide for any application being made by the decree-holder. The provision is that where money payable under a decree is paid out of Court to the satisfaction of the decree-holder, the decree-holder shall certify the payment to the Court, and the Court shall record the same accordingly. The rule contemplates a simple procedure—namely, a certification of payment by the decree-holder to the Court and a record by the Court of the payment; it does not provide for any notice being given to the judgment-debtor.

Order xxi., r. 2 (2.), provides an opportunity for the judgment-debtor to inform the Court of a payment made by him out of Court, and the procedure specified by this sub-rule is very different from the procedure referred to in r. 2 (1.).

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J. C. The judgment-debtor may inform the Court of the payment
 1928 and apply to the Court to issue a notice to the decree-holder
PRAKASH to show cause why such payment should not be recorded.
SINGH Sub-r. 2 therefore does contemplate an application by the
ALLAHABAD judgment-debtor; further, it provides for notice being given
BANK, LTD. to the decree-holder, it affords an opportunity for the decree-
 holder to appear, and it involves a judicial decision by the
 Court whether the payment should be recorded.

It is to be noted that in the case where an application under Order xxi., r. 2 (2.), is made by the judgment-debtor for the issue of a notice to the decree-holder to show cause why a payment made out of Court of any money payable under a decree should not be recorded as certified, it is provided by art. 174 of the schedule of the Indian Limitation Act that such application shall be made within ninety days of the time when the payment was made.

There is no express article of the Limitation Act applicable to the certification by the decree-holder of a payment made out of Court to him.

It is difficult to understand why the Legislature should have prescribed a specified time for the application, under Order xxi., r. 2 (2.), and should have made no specific provision of limitation with regard to the procedure of certifying by the decree-holder under Order xxi., r. 2 (1.), if such procedure were regarded as an "application" within the meaning of the Limitation Act.

It is also difficult to understand why the Legislature, according to the contention of the appellant, should have prescribed a period of three years from the date of payment within which the decree-holder might certify the payment, and at the same time provide that the judgment-debtor must make his application under Order xxi., r. 2 (2.), within ninety days of the payment.

The terms of Order xxi., r. 2 (1.), in their ordinary meaning do not involve any application by the decree-holder: the decree-holder would comply with the terms of the rule if he were to certify to the Court that money payable under the decree had been paid to him out of Court, and it would then

rest with the Court to record the payment in accordance with the provisions of the rule. The rule imposes a duty upon the decree-holder to certify the payment, and a duty upon the Court upon such certificate being given to record such payment.

Rule 2 (3.) provides that a payment which has not been certified as recorded as aforesaid shall not be recognized by any Court executing the decree. The provision in r. 2 (3.) no doubt was inserted for good reasons known to the Legislature, and it is obvious that the provision must tend to simplify and expedite the proceedings in the Court executing the decree. There is nothing, however, in r. 2 (3.) to indicate that the Legislature intended that the certification of a payment by the decree-holder under r. 2 (1.) should be treated as an "application."

The above-mentioned rules contemplate that the decree-holder, to whom a payment has been made by the judgment-debtor out of Court, should certify such payment to the Court within a reasonable time in order that it might be recorded by the Court, and the judgment-debtor is protected by the provision that in the event of the decree-holder failing to certify the payment to the Court, the judgment-debtor may apply to the Court for a notice to issue to the judgment-creditor to show cause why the payment should not be recorded as certified, provision being made by art. 174 of the Limitation Act that such application by the judgment-debtor must be made within ninety days of the time when payment was made. In view of these provisions, apparently it was not thought necessary to provide any specific time within which the judgment-creditor must certify the payment under Order xxi., r. 2 (1.).

Having regard to the ordinary meaning of the words used in Order xxi., r. 2 (1.), the difference between the procedure under r. 2 (1.) and the procedure under r. 2 (2.) and the above-mentioned scheme of the provisions contained in the said rules, their Lordships are of opinion that the mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under Order xxi., r. 2 (1.),

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J. C. is not an application within the meaning of art. 181 of Sch. I. of the Indian Limitation Act.
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BANK, LTD. It was, however, argued on behalf of the appellant that in this case the respondents had not confined themselves to certifying the payments in question, but that they had, in fact, made an "application" within the meaning of art. 181, and reference was made to the document filed by the respondents on December 8, 1924. It is true that the document is headed "Application under Order xxi., r. 2 C.P.C." and it is in the form of a petition wherein the facts relied upon are set out. In para. 4, however, it is stated that the bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order xxi., r. 2 (1.) of the C.P.C.

This paragraph contains the certificate which is required by Order xxi., r. 2 (1.), and the prayer is no more than a request that the Court will carry out the provisions of the rule and record the payments. It is clear that the respondents intended to certify and did certify in accordance with the above-mentioned rule, and the mere fact that the document was called an "application" and was in the form of a petition cannot, in their Lordships' opinion, alter the real nature of the procedure and convert what was really no more than a certificate of certain payments into an "application" within the meaning of art. 181.

It was further argued that in some cases in India it had been held that where a decree-holder had proceeded to certify a payment which had been made out of Court in satisfaction of a decree, he had taken a step in aid of execution of the decree within the meaning of art. 182 (5.), of the Indian Limitation Act, and that if such procedure were held to be an application for the purpose of art. 182 (5.), it must also be an application within the meaning of art. 181.

Their Lordships do not think it necessary in this appeal to express any opinion with reference to the cited cases dealing with matters which were held to be steps in aid of execution of a decree or order. Each case must depend upon the facts relating thereto, and it is sufficient for the disposal of this

appeal for their Lordships to hold that the document of December 8, 1924, was in effect no more than a certification of payments by the respondents, and that such certification was not an application within the meaning of art. 181 of the Indian Limitation Act.

Consequently, the application for execution of the decree by reason of the payments certified and recorded was not time-barred.

The above-mentioned conclusion renders it unnecessary for their Lordships to consider the question relating to the alleged acknowledgments in writing, and it should be noted that the learned counsel were not called upon to present their arguments in respect of that question.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

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J. C.* LAKHAMGOWDA . . . BASAVAPRABHU } APPELLANT;
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— APPANNA AND OTHERS (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Service Tenure—Grant by Desai—Shet Sanadis—Services outside Village in which Lands granted

In 1770 and 1837 desais, the appellant's ancestors, granted to the respondents' ancestors lands in one of their watan villages on service tenure. The nature of the services to be rendered, and whether they were confined to services in the village, did not appear from the grants. There was however evidence of a Government inquiry, presumably under Act XI. of 1852, in which the respondents' ancestors were found to be shet sanadis holding from the desais:—

Held, having regard to the military nature of the services formerly rendered by shet sanadis, and the oral evidence of the services actually rendered since 1873 by the first respondent and his father, that the services to be rendered were not confined to services in the village.

Decree of the High Court reversed.

APPEAL (No. 19 of 1927) from a decree of the High Court (January 1, 1925) reversing a decree of the first class Subordinate Judge of Belgaum (June 1, 1922).

The suit was brought by the appellant who claimed to eject the respondents from lands which he alleged they held from his ancestors and himself as service tenants, unless they agreed to render him the general services of two men of their family.

The facts appear from the judgment of the Judicial Committee.

The trial judge decreed the suit.

An appeal to the High Court was allowed. The learned judges, while affirming that the lands were not kadim inams, but were held under grants from the appellant's ancestors, held that the services to be rendered were confined to the village in which the lands were situate.

* Present: VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH, and SIR JOHN WALLIS.

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The respondents did not appear.

Nov. 27. The judgment of their Lordships was delivered by SIR JOHN WALLIS. This is an appeal from a decree of the High Court at Bombay reversing a decree of the Subordinate Judge of Belgaum and dismissing a suit brought by the plaintiff, the Desai of Vantmuri, to eject the defendants from certain lands held by them on service tenure in the village of Nagannanoli in case of their not agreeing to render to the plaintiff the services claimed from them, and also for damages.

The important office of desai had formerly been hereditary in the plaintiff's family; and Nagannanoli, one of the villages which had formed the watan or endowment of the office, had been confirmed to them in inam by the British Government after the office and its duties had ceased to exist.

According to the plaint, the plaintiff's inam lands in the village included three parcels, A, B, C, containing $7\frac{1}{2}$ bighas. $3\frac{3}{4}$ bighas and $7\frac{1}{2}$ bighas respectively, of which A and B had been granted by the plaintiff's ancestor to one Shivappa Iti in Fasli 1180 (1769-70) and C had been granted to his son Appanna Bhimanna Iti, in Fasli 1247 (1836-7) for bada, mushahira, or stipend in land for the services they might be called on to render in the desgat, or desai's district. The defendants' family had, it was alleged, continuously rendered service as a peon and a shagirti, or attender, until August 1917, since which time, on the evil advice of the plaintiff's enemies, they had ceased to do him service.

The defendants in their written statement denied that their lands had been granted to them on these terms or that they had in fact rendered service as peons and shagirtis. They and their ancestors, they alleged, had all along been doing service at Nagannanoli as sanadis, and were willing to continue doing so. In 1917 the plaintiff, with the evil object of depriving them of these lands, had required them to stay at Vantmuri, the village where he resides, and to do service

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in his house to which service he was not entitled. They denied that the grants mentioned in the plaint were genuine, and alleged that they held the suit lands as kadim sarva inams—that is to say, ancient revenue free grants for village service—and that the plaintiff had no control over them or right to dismiss them or resume their lands, as they were under the control of the British Government.

The Subordinate Judge, in a lengthy judgment containing a full precis of the documentary and oral evidence, held that the defendants' inams in the village were not kadim, that the grants relied on by the plaintiff were genuine, and that the evidence showed that the plaintiff was entitled to the services which he claimed from the defendants and the defendants refused to render. He accordingly decreed the plaintiff's suit. This decree was reversed by the High Court on appeal.

The learned Chief Justice, who delivered the judgment of the Court, accepted the genuineness of the grants relied on by the plaintiff, but held that the earlier grant was for rendering service as a village peon, and that the later grant did not show what service was to be rendered, but, he added: "I think it is apparent from the record that these lands were to be held by the defendants' family in return for rendering services as shet sanadis; that is to say, they were to be servants in the village of Nagannanoli, not only to help in the administration of the village, but also to render services in connection with that village." He went on to observe that the first defendant and his father had no doubt been rendering personal services on occasions to the desai, but that it could not be inferred that these services were other than voluntary. He was of opinion that the documentary evidence did not support the plaintiff's case, and that the oral evidence did not go further than to show that on occasions the first defendant and his father had rendered personal services. With these general observations he allowed the appeal and dismisses the suit.

In the unfortunate absence of the respondents, who are not represented by counsel, their Lordships have had to

examine the whole record, both with the valuable assistance of the learned counsel for appellant and independently, and have arrived at a different conclusion as to the nature of the services the defendants were to render.

It will be convenient in the first place to deal with the defendants' contention that their inams were kadim or in existence before the grant to the plaintiff's predecessors, which, if proved, would be fatal to the plaintiff's case. The question whether, when a village was held in inam, the lesser inams in the village were kadim or ancient, or jadid or modern, was of great importance in the inquiries which were held under the Governor-General in Council's Act XI. of 1852 for the adjudication of titles claimed to be wholly or partially rent free in the Presidency of Bombay, because, if they were kadim or in existence at the date when the village itself was granted in inam, the right of resumption would be vested in the government and not in the inamdar, as is correctly stated in the written statement. This question came before the Board in *Laxmanrao Madhavarao v. Shrinivas Lingo*.⁽¹⁾ Now it appears from Ex. 162, a village return furnished to Government in 1860-61, that there had been an inquiry by the revenue authorities—in all probability one of the inquiries for the purposes of the Act, which were being held throughout the Presidency—and that it had been decided that the inams of twenty shet sanadis in the village including the defendants were jadid (that is to say, modern) and not kadim and that the right of resumption was in the inamdar.

In their Lordships' opinion this document shows that the defendants' inams were not kadim; and the same result follows from the concurrent finding that they were created by the plaintiff's predecessors in 1770 and 1837. These grants, however, only cover lands A and C in the plaint, but Ex. 162 shows that in 1860-61 Appanna, son of Bhima bin Shevanna, the defendants' ancestor, was holding B as well as A as a shet sanadi, and there are not sufficient reasons for holding that it was held on a different tenure.

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It being found then that the defendant's inams were jadid or created by the plaintiff's ancestors, the question is, were they created for purely village service or for personal service generally. It appears from the documents already cited that the defendants were described as shet sanadis, as found by the learned Chief Justice.

A shet sanadi in Wilson's Glossary is defined as: "One holding a sanad or grant of lands for military service, applied especially to a local militia acting also as police and as garrisons of forts: also an assignment or grant of revenue of land for certain services; the assignment, as well as the office, may be hereditary."

There is nothing in this definition to support the view of the learned Chief Justice that the services were to be rendered in the village itself or were to be in connection with the administration of the village, nor is it in their Lordships' opinion in accordance with the evidence in the case.

The grant of 1770, Ex. 117, in favour of the defendants' ancestor, Itakari Shevanna, was made in succession to a pyadi, or peon who was removed, and would also seem to have been granted on peon service; but there is nothing to show that such service was to be confined to the village. In Ex. 118, the grant of 1837, the nature of the service is not specified. There is, however, in Ex. 175, a statement made by Basavaprabhu the first defendant's father, in 1873, after the death of his father Appanna, that the inam lands (which appear from the measurement given to include the three parcels in the plaint A, B and C) had been continued to him by the sansthan, and that he alone did the service of the sansthan. The word "sansthan," which is the same as "samastanam" in use on the east coast, means residence, and is a respectful way of speaking of persons of position such as a raja, a zamindar or a desai. It is also used in speaking of a temple. The statement therefore is that the defendants' ancestor was in the service of the desai generally.

As regards the oral evidence, the learned Chief Justice has commented on the fact that it only shows that personal

service was rendered by the first defendant and his father, but, as it appears from Ex. 175 already mentioned that the first defendant's grandfather died in 1873, or earlier, it would be unreasonable to expect oral evidence as to personal service having been rendered in his lifetime. It is not always easy in India to prove even recent happenings satisfactorily by oral evidence; but in this case we have the admissions of the first defendant as to the services rendered by his father himself and his son, the second defendant. The correspondence no doubt shows that the first defendant did work for the plaintiff in his own village of Nagannanoli, and also used to be sent as a peon or messenger from Nagannanoli to Vantmuri, where the plaintiff resided. It is, however, also proved that the first defendant, who was one of the twenty shet sanadis in his village, did turns of service at Vantmuri, the plaintiff's headquarters. Further, the first defendant admits that he had a wife at Vantmuri, that he used to stay there doing service and that he used to serve there under the Chief Kharbari for two or three months at a time. The service consisted in sitting in the chavdi, going to Belgaum and bringing medicine, &c., bringing waseel (money), from villages, and taking letters and papers to other people. Whenever he stayed at Vantmuri, he did this service. That is to say, it was ordinary peon service.

He also had to admit that he went about with the plaintiff and his son to such places as Bombay, Poona and Bellary and rendered them personal service there. His own admissions therefore furnish strong corroboration of the plaintiff's evidence, and show in their Lordships' opinion that he was in the habit of rendering personal service to the plaintiff outside his own village of Nagannanoli though no doubt he was allowed to remain there for long periods and whilst there was employed to attend to the plaintiff's affairs, as appears from Exs. 94 to 99. He further makes the significant admission that he was one of twenty shet sanadis in the village, and that he was the only one who had ceased to do service. He states that he had spent Rs.20,000 on the suit lands in sinking wells, &c., and it may well be that having

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risen in the world, he had become unwilling to go on rendering the customary services to the plaintiff.

On the other hand, the fact that the plaintiff in his plaint only seeks to evict the defendants in case of their still refusing to render the customary services, lends no support to the defendants' allegation that the suit was brought with a view of depriving the defendants of their lands.

There is one other consideration of a general character to which their Lordships will refer. As already stated, there are twenty shet sanadis in the village of Nagannanoli, who are in the service of the plaintiff and are not, as the defendants contended, village officers holding kadim inams and subject to the revenue authorities. The explanation would appear to be that the position of the plaintiff's ancestors as hereditary desais rendered it necessary for them, according to the custom of the country, to have a large retinue of peons and attenders in their service. That service, according to the definition of shet sanadi, in Wilson's Glossary, included military service which has since become obsolete, leaving them liable only to personal service of a non-military character; but there is no reason for supposing that either formerly or in recent times that service was confined to the village in which their inam lands were situated.

One further point remains to be dealt with. The first defendant in his evidence denies that more than one of the family rendered service at a time. The plaint claims that the plaintiff is entitled to the services of two people and this is not denied in the written statement or in the grounds of appeal to the High Court. Looking at the pedigree set out in the Subordinate Judge's judgment, it appears that the grant of 1770 was made to Shevanna, the father of Bhima, and that the grant of 1836 was made to Bhima's son Appanna. As Bhima died about 1857, it is clear that both the father and son were rendering service at the same time under their respective grants, and the exhibits referred to in the Subordinate Judge's judgment shew that this state of things continued until Bhima's death, since which time both inams have been enjoyed by the same people. The oral evidence

as to rendering service by two members of the family is, no doubt, meagre; but there appears to be no sufficient reason for holding that the obligation to render service of two persons has come to an end.

In their Lordships' opinion the appeal must be allowed, the decree of the High Court reversed, and the decree of the Subordinate Judge restored with this modification that the defendants are to have three months from the date of the Order in Council in which to render the service to the plaintiff, and that the defendants do pay to the plaintiff his costs here and in the Courts in India. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

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BOMANJI ARDESHIR WADIA AND } APPELLANTS; J. C.*
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AND
SECRETARY OF STATE FOR INDIA IN } RESPONDENT.
COUNCIL (DEFENDANT) }
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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Land Revenue—Grant of Villages partly occupied by permanent Tenants—Non-agricultural Assessment imposed after Grant—Rights of Grantee to Assessments—Construction of Grant—Antecedent Correspondence—Admissibility—Land Revenue Code (Bom. Act V. of 1879), s. 48, sub-s. 2.

A grant in 1848 by the Bombay Government to the first appellant's ancestor, after reciting that the grantee had prayed that a Government grant of Rs.4000 per annum which he enjoyed might be exchanged for a grant of villages in Salsette Island, stated that two named villages "are hereby assigned to you and your heirs in perpetuity." The boundaries and other particulars of the land followed, with a detailed statement of the land revenue paid by sutidars (occupant owners) amounting to Rs.4679; from this was deducted "the amount of your inam," Rs.4000, leaving a difference "payable by you annually Rs.679." It

* Present: VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH, and SIR JOHN WALLIS.

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was further provided that if the grantee brought into cultivation land not then assessed he would, after a certain period, be liable to assessment thereon; that in case of the land assessment being increased, or any other modification of the revenue system being introduced, by the Government, "the same shall have operation within the villages hereby granted to you"; and (condition 20) that the deed conferred "no right which the Government does not now possess, and only such portion of the right of Government as may be herein specifically granted is hereby granted to you." In 1917 the Government imposed on lands in one of the villages non-agricultural assessments under the Bombay Land Revenue Code, 1879, s. 48, sub-s. 2, and rules made in 1907 under s. 214 of that Act. The appellants sued, claiming that they were entitled to have the amount of the non-agricultural assessment, in whole or in part, credited to them. It was common ground that the village was an "alienated village" as defined in s. 3 of the Code. The High Court dismissed a claim by the grantees' successors to the non-agricultural assessment imposed on the land occupied by sutidars.

Held, (1.) that the grant of 1848 was not merely an assignment of Rs.4000 per annum out of the revenues of the villages, but was a grant of the villages subject to the conditions attached.

(2.) That as by s. 48, sub-s. 2, of the Land Revenue Code, the non-agricultural assessments were merely in substitution for the former assessments, condition 20 did not apply, and the appellants were entitled to be credited with the amount so assessed upon the land occupied by the sutidars, it not being practicable to fix the appellants' share in the proportionate manner referred to in r. 5 of the revenue rules of 1907.

Held, further, that the trial judge had been in error in construing the deed in the light of the antecedent correspondence between the parties, it being well settled that even a formal antecedent contract cannot be looked at to control the terms of a conveyance.

Lee v. Alexander (1888) 8 App. Cas. 853, 868, per Lord Selborne, and other cases, applied.

Decree of the High Court reversed.

APPEAL (No. 97 of 1927) from a decree of the High Court (August 24, 1925) affirming a decree of the Joint Judge of Thana (November 30, 1921).

The suit was brought by the appellants against the Government for declarations that on the true construction of a deed of February 9, 1848, executed by the Government in favour of their predecessor, they were the owners of the village Vile Parla, and were entitled in whole or in part to non-agricultural assessments levied thereon by the Government and for ancillary relief. It was not disputed upon the present appeal that the Government was entitled to impose non-agricultural assessment under ss. 48, 65 and 66 of the Bombay Land Revenue Code, 1879, and that the villages

were "alienated villages" within the meaning of r. 5 of revenue rules made in 1907 under s. 214 of the above Code.

The terms of the deed of 1848 appear from the judgment of the Judicial Committee.

The trial judge construed the deed of 1848 as "merely an assignment of Rs.4000 out of the revenues of the villages" subject to the other terms. He accordingly dismissed the suit so far as it related to the assessments imposed upon lands in the occupation of permanent tenants. As to the remaining lands, condition 12 made the grantee liable to increased assessments, but r. 6 of the above mentioned rules provided that they were not to apply "to lands in the actual possession and enjoyment of the holder or holders of the alienated village"; he made therefore a declaration (as to which no question arose upon the present appeal) that in respect of lands in the plaintiffs' possession and enjoyment they were exempt, and ordered an inquiry as to what lands were within that category. The decree was affirmed by the High Court (Macleod C.J. and Madgavkar J.).

1928. Oct. 26, 29, 30. *Upjohn K.C. and E. B. Raikes* for the appellants.

Sir George Lowndes K.C. and Kenworthy Brown for the respondent.

Nov. 27. The judgment of their Lordships was delivered by **VISCOUNT DUNEDIN**. Early in the last century an ancestor of the leading plaintiff for services rendered to the Government received a grant of Rs.4000 per annum. In 1844 his successor prayed that the grant might be changed into a grant of villages in Salsette, an island near Bombay. This after some negotiations was done in 1848 and the grant which falls to be construed in this action was given.

This grant, after a preamble narrating the original grant of Rs.4000 to the family and the request that it might be exchanged for a grant of villages, goes on as follows: "The aforesaid villages of Juhu and Vile Parla in the island of Salsette are hereby assigned to you and your heirs in perpetuity

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from the year A.D. 1847-8. The particulars of the cultivation, etc., founded on the Jamabandi of 1842-3 and the conditions of the grant are as follows :—”

Then follows a long and minute description of the villages, the boundaries and the various lands from which revenue was levied, calculated partly on the lands and partly on the produce of brab trees which are tapped for toddy. All the particulars referred to lands as held by various ryots or sutidars, as to whose position explanation will be shortly given. The list ends with a summation of the revenue at the sum of Rs.4679-1-8. From this is deducted “the amount of your inam Rs.4000.” It is added that there are ninety-seven undrawn brab trees for which “the grantee is to pay Rs.20-14-4,” making the whole sum payable by him as the surplus over the Rs.4000, Rs.700. Subsequently, on condition of the surrender of certain other lands not included in this grant, the Rs.700 was reduced to Rs.200. The deed then goes on with various conditions which will be examined hereafter.

It is now expedient to explain the position of the ryots or sutidars. By legislation in 1808, the sutidars in Salsette were declared to be permanent proprietors of their lands so long as they paid the amount of their assessment, and this assessment was fixed at a sum equivalent to a certain share of the produce and could be revised every five years.

The effect of the deed is in their Lordships' view quite clear. It is a grant of the villages. The villages consist partly of land occupied by sutidars and partly of land not so occupied. So far as the land occupied by the sutidars is concerned, the grant becomes in effect a grant of the revenue payable by them. So far as the other land is concerned, though the grant is to the grantee, yet if he brings it under cultivation he is bound, in virtue of a condition which will be hereafter quoted, to pay the assessment just as a new sutidar would have to pay had he been settled there by the Government.

The grantee entered into possession under the grant and his heirs succeeded. They annually paid the Rs.200 and have drawn regularly the revenue from the sutidars, as that

revenue was from time to time fixed; in particular there was an increase in 1885 and they recovered the increased sum. The appellants represent the original grantee. They were in actual possession of certain portions of the land not held by sutidars, but they do not appear to have brought additional land into cultivation.

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In 1879 the Bombay legislature passed an Act called the Bombay Land Revenue Code. By this Act, s. 48, sub-s. 2: "Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the Governor in Council may prescribe in this behalf." By s. 214 the Governor in Council was authorized to make rules regulating the assessment of land to the Land Revenue and the alteration and revision of such assessment and the recovery of land revenue. Rules under that section were published in 1907. Rule 1 provided that when land assessed for purposes of agriculture only is subsequently appropriated to any purpose unconnected with agriculture, the assessment upon the land so appropriated shall, unless otherwise directed by the Governor, be altered and fixed and revised by the Collector. After providing in subsequent rules that when an application for a permission to appropriate the land to other purposes than agriculture is received by the Collector, he should forward it to the holder of the alienated village who should then state whether the application should be granted or refused, r. 5 provides that after that the Collector shall direct the village officers to levy any altered assessment so ordered and such altered assessment shall be levied in the same manner as other land revenue and shall be credited wholly to the holder or holders of the alienated village where such holder or holders are entitled to the whole land revenue of the village or proportionately to the share of such holder or holders when such holder or holders are entitled to a proportion only of the land revenue in accordance with the conditions

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1928 village.

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~~SECRETARY OF STATE FOR INDIA.~~ In November, 1916, without any intimation to the plaintiffs, a surveyor began to survey various building plots in the village of Vile Parla, with a view to fixing a building assessment thereon. On this coming to their knowledge the plaintiffs wrote asking for an answer as to whether the Collector considered that the building or non-agricultural assessment should be paid to them. To this they received a reply that the Government's view of the grant was that the grantees had no right to a non-agricultural assessment, which belonged to the Government. After some ineffectual appeals to revenue officers the plaintiffs raised the present suit to determine the question. The leading demand is that a declaration should be made that the non-agricultural assessment levied under a statute of rules should be paid to them as in place of the agricultural assessment which they previously received. They also asked for repayment of a building assessment which had been levied on lands in their own actual possession.

The suit depended before the joint Judge of the Thana District. He held that the plaintiffs were entitled to recovery of such assessment as had been made on lands in their actual possession, but as regards the main claim he dismissed the action. Appeal was taken to the High Court of Judicature at Bombay, which affirmed the judgment, and from that judgment the plaintiffs appeal to His Majesty in Council.

The learned trial judge examined with great care the correspondence which took place between the parties before the deed of 1847 was granted, and he came to his opinion on the true meaning of the deed, as he puts it himself, "after a careful consideration of the deed in the light of the correspondence." Their Lordships must say at once that this way of approaching the true construction of the deed is quite illegitimate. The learned judge in another passage says that because the correspondence is referred to in the deed that makes it part and parcel of it. The only reference to the correspondence is in the narrative in the preamble

of the deed that there had been such a correspondence, but it is a vital mistake to suppose that that introduces the correspondence as a part of the deed. Nothing is better settled than that when parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it. This is especially true of a conveyance. There even, if there has been a formal antecedent contract, that contract cannot be looked at to control the terms of the conveyance; much less can mere communings, which could only show what parties meant to do but cannot show what they did. It would be otiose to set forth at length the authorities, but reference may be made to the dictum of Baron Parke in *Shore v. Wilson*(1); *Smith v. Doe d. Jersey*(2); *Prison Commissioners v. Clerk of the Peace for Middlesex*, per Sir G. Jessel(3); and *Lee v. Alexander*(4), in which (the case is a Scotch case where the law is the same) Lord Selborne states the proposition as a general one.

While their Lordships have thought it expedient to make it quite clear that this method of approaching the question used by the trial judge was illegitimate, they note that no such criticism can be directed to the judgment of the High Court. Those learned judges, although only expressing their opinion as a doubt as to the admissibility of what the trial judge had done, yet clearly make up their minds on the construction of the deed, but the result at which they arrived is the same as that arrived at by the trial judge. Their view is tersely expressed by the first finding of the trial judge: "The grant is neither an absolute grant of the soil nor a mere assignment of the revenues. It is merely an assignment of Rs.4000 out of the revenue of the village subject to the conditions of the grant."

From that view they deduce the further consideration, that what they called conditional or enhanced assessment belongs to the Government.

(1) (1842) 9 Cl. & F. 355, 555.

(2) (1821) 2 Brod. & B. 473.

(3) (1882) 9 Q.B.D. 506, 511.

(4) (1888) 8 App. Cas. 853, 868.

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In their Lordships' view this is a complete inversion of the scheme of the deed, prompted rather by a view as to what in the circumstances the Government ought to have done rather than by a strict observation of what they did do. No doubt it was clear that the Government intended and thought that what they were giving was worth Rs.4000; but they were not giving Rs.4000. On the contrary they were giving something instead of Rs.4000 which at that time they were paying in cash. Now whenever one person gives another something instead of what he has got, both parties take the risk of whether the thing that is given will keep, or lose, or enhance its value. Even an obligation to pay in currency is liable to that risk. The fluctuations in quite recent years in European rates of exchange have brought home that lesson to many an unfortunate grantee. Now what did the Government grant by the deed? Indubitably they granted not money but villages. These are the only words of conveyance. The something they were giving, i.e., villages, were on accurate calculation worth more than Rs.4000 yearly, which was the sum of which in cash the Government were being relieved. They calculated to a rupee what the gift was worth, and then say "deduct your inam," i.e., your old free grant, and you will find you get Rs.600 odd too much. There is a little extra for some brab trees, and therefore you will become bound to pay us Rs.700 a year, and that is to be an ordinary debt recoverable like any debt by process. How fantastic is the idea to turn this into what the learned judge of the trial Court called an "annuity" of Rs.4000.

Doubtless, however, the villages are granted under conditions. Their Lordships will now analyse the conditions. Conditions 1, 2 and 3 have been already dealt with, for they embody the calculation of how much is the worth of the lands and the brab trees and how much they exceed Rs.4000 and they provide for the payment of Rs.700 as excess, which excess is to be paid as an ordinary debt payable on a day certain and recoverable by process.

The fourth and fifth conditions explain that if the grantee brings into cultivation any land not then cultivated and

consequently not assessed, he will after a certain moratorium be liable to assessment for that, just as the ryots are for their land.

Then come the fasciculus of conditions 6, 7, 10 and 14, which secure the provision to outsiders of quasi easement rights hitherto enjoyed.

Then the position of the grantee to the ryots or sardars is specially dealt with, and those articles had better be quoted in full: "8. You are to continue the ryots in the free enjoyment of their sootee lands, brab and other trees of which they are the owners as well as such other privileges as they may be entitled to in the same manner as they have enjoyed them before.

" 11. You are not to alter the present mode of assessment nor to introduce any new tax but to collect your rents from the ryots according to the commutation taxes as they may be fixed from time to time in the Island of Salsette. You are not to fix your instalments earlier than those fixed for the Government villages, though you may postpone them to a later period should you wish it.

" 12. In the event of land assessment being increased or any other modification introduced in the existing revenue system of the Island of Salsette by the authority of the Government, the same shall have operation within the villages hereby granted to you."

The remaining conditions have to do with miscellaneous matters in which the grantee is warned against trying to exercise any magisterial authority, etc. Then there is one condition on which the learned counsel for the respondent laid great stress—namely, condition 20: " 20. It is clearly to be understood that this deed confers no right which the Government does not now possess and only such portion of the rights of Government as may be herein specifically granted is granted to you."

In conclusion, condition 21 provides that the grant is only to be to the grantee and not to donees and that on failure of heirs the grant is to revert to the Government.

It will be observed that these conditions leave the matter of the grant exactly as it was, i.e., that the only grant is the

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grant of the villages. The learned judges having settled as mentioned that the deed is the grant of an annuity then proceed to consider what is to be the fate of the building assessment which is imposed on such ryots as have decided to divert the land from agricultural to building purposes and come to the conclusion that this extra assessment, as they call it, belongs to the Government. Here there is another misconception. The Act of 1879 by s. 48 does not provide for an additional assessment; it only provides for an altered assessment to be imposed according to rules. Once the building assessment is imposed the old agricultural assessment has gone for ever. This, if it is thought out, is quite logical. The root idea of British rule in India is that he who has the soil must pay, not in kind like a proper tithe, but in money, a certain proportion of what he gets from cultivation, and this money payment can be raised from time to time so as to maintain the proportion to the fruits of cultivation which have increased. If therefore the cultivation for agricultural purposes is given up and the land is used for building, the building assessment carries out the same idea, as being the equivalent for a certain proportion of what the cultivation of lands under these new conditions might bring. Therefore, inasmuch as the ryots agricultural assessment in virtue of the grant of the village went to the grantee, so does the altered or building assessment, unless under the rules which the Government have power to make its destination is in some way altered, but the rules absolutely recognize the same right.

Rule 5 of the Revenue rules of 1907, already quoted, says that the altered assessment shall be levied in the same manner, i.e., as the agricultural assessment, is levied, and shall be credited to the holder or holders of the alienated village or a holder in part. Now, by s. 3 of the Land Revenue Code, the interpretation section, it is settled what is an alienated village. "Alienated," says that section, sub-s. 20, "means transferred in so far as the rights of Government to payment of the rent or land revenue are concerned wholly or partially to the ownership of any person." Before the

grant the Government were the holders of the village as a whole entity, the sutidars being proprietors of their own respective plots, but in no sense owners, of the village. Then by the deed of 1847 the village was alienated as alienated is defined in the section just quoted, and so alienated to the appellants. They were then the owners of the village. They are not, however, the proprietors of the whole village, because there is still land on which assessment may be allowed when the land comes into cultivation, and that amount of assessment by the terms of the deed goes to the Government. This ownership, however, is not an ownership in esse but is an ownership in posse. Now it would be pure speculation to fix the proportion which the ryots assessment enjoyed by the appellants bears to the possible amount which the Government will enjoy if other land is brought into cultivation. The simple plan therefore seems to be to fix that when a building assessment comes into being that assessment should come to the person to whom the agricultural amount which it displaces should go.

Condition 20, which the respondent's counsel so strongly pressed, has no application. The building assessment is not a grant now of the Government of something which they did not possess in 1847 but do possess now. It is not a grant at all. The old agricultural assessment was granted. Then comes legislation which binds the Government just as much as the grantees, and turns that agricultural assessment into an altered building assessment; but it is still the same assessment on the same lands.

Their Lordships are therefore of opinion that the judgment must be reversed in so far as it denies the appellants all right to building assessment, and that a declaration should be made to the effect just stated. The rest of the judgment will stand. The appellants must have the costs before this Board and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Ranken Ford & Chester.*

Solicitor for respondent: *Solicitor, India Office,*

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J. C.* SARAT KUMARI BIBI APPELLANT;
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ON APPEAL FROM THE HIGH COURT AT PATNA.

Probate—Will—Onus of Proof—Will prepared under Suspicious Circumstances—Severable Provisions invalid—Grant of Probate as to rest of Will.

In all cases in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator, it is for those who propound the will to remove that suspicion, and it is only when that has been done that the onus is thrown on those who oppose the will to prove fraud or undue influence. The above principle is not confined to cases in which the will has been prepared by a person who takes a pecuniary benefit under it.

Tyrrell v. Painton [1894] P. 151 applied.

Where the suspicion arises only as to one particular provision which is severable, and that suspicion is not removed, the Court can admit the rest of the document to probate.

Rhodes v. Rhodes (1882) 7 App. Cas. 192 applied.

Decree of the High Court reversed.

CONSOLIDATED APPEAL (No. 21 of 1927) from a decree of the High Court (December 9, 1925) reversing a decree of the District Judge of Bhagalpur.

The consolidated appeal arose out of an application by the respondents for a grant of probate of a will dated July 24, 1923, of which they were four of the five trustees.

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge dismissed the application.

From his decree there were two appeals, one by the present respondents, and the other by the testator's sister, Rajdulari Bibi.

The High Court (Das and Foster J.J.) allowed the appeals and directed that probate should issue.

1928. Nov. 8, 9. *De Gruyther K.C.* and *Wallach* for the appellant.

Sir George Lowndes K.C. and *E. B. Raikes* for respondents 1 to 4.

A. Pocock for the respondent Rajdulari Bibi.

* Present: LORD PHILLIMORE, LORD ATKIN, and SIR LANCELOT SANDERSON.

Nov. 30. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. These are consolidated appeals by Sarat Kumari Bibi against two decrees of the High Court of Judicature at Patna dated December 9, 1925, whereby the decree of the learned District Judge of Bhagalpur dated June 23, 1924, was reversed.

The respondents, Rai Sakhi Chand Bahadur, Babu Ganesh Lal, Madusudan Das and Maulvi Jamaluddin Khan who are four out of the five trustees named in the will purporting to have been made by one Raghunandan Lal on July 24, 1923, filed an application for probate on February 27, 1924, in the Court of the said District Judge of Bhagalpur.

Raghunandan died on August 31, 1923, leaving two daughters, Raj Kumari Bibi and Sarat Kumari Bibi. His other near relations were his widowed sister Rajdulari Bibi and Krishna Bibi, the widow of Raghunandan's brother, Jadunandan Lal.

Caveats were filed by the two daughters and by Krishna Bibi; but objections were filed by Krishna Bibi and Sarat Kumari Bibi only. In these appeals the Board is concerned only with the objections raised by the daughter, Sarat Kumari Bibi, who is the sole appellant.

At the hearing of the appeals before the Board the four above-named executors and Srimati Rajdulari Bibi, who is one of the respondents in the second appeal, appeared by learned counsel. Krishna Bibi was not represented.

Three issues were framed by the learned District Judge as follows: (1.) Was the will validly executed and attested? (2.) Was the testator in a sound disposing state of mind at the time of execution of the will? (3.) Was the will executed under the undue influence of Maulvi Jamaluddin Khan?

The learned judge answered the second issue in the affirmative and the third issue in the negative. On the first issue he held that the will was not validly executed, and he answered the first portion of the issue—namely, as regards execution—in the negative and the second portion—namely, as regards attestation—in the affirmative.

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The ground of his decision was that the propounders of the will had failed to satisfy him that the testator was aware of the contents of the will and that the will expressed his intention. He was of opinion that a very active part in the preparation of the will was taken by Jamaluddin, who was the manager and confidential servant of the testator, and that he took a substantial benefit under the will. Applying the principles laid down in *Barry v. Butlin*(1) and *Tyrrell v. Painton*(2), the learned judge held that the circumstances in connection with the preparation of the will aroused suspicion, that such suspicion had not been removed, and that he was not satisfied that the testator was aware of the contents of the will. He accordingly refused to grant probate of the will to the executors.

Rajdulari Bibi and the four above-named executors appealed in two separate appeals to the High Court of Judicature of Patna.

The learned judges of the High Court on December 9, 1925, allowed the appeals, set aside the decree of the learned District Judge, and directed that probate should issue as prayed. They held that the will created no trust in favour of Jamaluddin, that the learned District Judge was wrong in thinking that there was any suspicion inherent in the will which took the case out of the ordinary rule—namely, that the proof of capacity and the fact of execution carry with them the presumption that the testator had knowledge of the terms of the will. The learned judges said that they were prepared to go further and hold that there was satisfactory evidence to satisfy the conscience of the Court that the testator had full knowledge of the terms of the will, including those contained in the twelfth paragraph.

Sarat Kumari Bibi, a minor appearing through her guardian and next friend, Jugal Krishna Prasad, has appealed against the said decrees of the High Court to His Majesty the King in Council.

At the hearing before the Board it was admitted by learned counsel appearing for the appellant that the will was

(1) (1838) 2 Moo. P. C. 480.

(2) [1894] P. 151.

undoubtedly executed by the testator, that it was duly attested and registered, and that now there was no suggestion of undue influence.

The argument presented on behalf of the appellant was that the view of the High Court in regard to the benefit alleged to be conferred on Jamaluddin under the will was not sound, and that the conclusion of the learned District Judge in holding that it had not been satisfactorily proved that the testator was aware of the contents of the will, was correct. It was further contended that in any case there was no reliable evidence that the testator was aware of the provisions contained in the twelfth paragraph of the will, and that the probate, if granted, should be granted excepting the said twelfth paragraph.

The main provisions of the will are that the two daughters are given legacies of Rs.500 monthly each, which will descend as far as their children's children. The testator's sister is given Rs.500 monthly and the testator's residential house and furniture. Rs.300 monthly is given to an aunt of the testator Rama Bibi, Rs.200 monthly to Madusudan Das, a second cousin, and after one or two other smaller legacies the balance is to go in the first instance to the improvement of the estate and, secondly, to the constitution of a Poor Students' Fund.

The twelfth paragraph of the will is as follows: "XII. For carrying out the above-mentioned provisions, I, the executant appoint five trustees: (1.) Rai Bahadur Babu Sakhi Chand, Superintendent of Police, at present manager of the Jagannath Temple, residing at present at Puri; (2.) Rai Bahadur Surja Prasad, son of Babu Ras Bihari Sahay, deceased, Vakil, resident of Mahalla Khanjarpur, district Bhagalpur; (3.) Babu Ganesh Lal, my Khalera brother-in-law (cousin-in-law), resident of Mahalla Guzri, Patna City; (4.) Babu Madusudan Das, son of Babu Ram Narayan Das, deceased, (who is) my relative resident of Mahalla Golaghat, Bhagalpur, and proprietor of the Gopal Steam Press, Bhagalpur; (5.) Maulvi Jamaluddin Khan, the present manager of my estate, resident of Mahalla Imamnagar, district of Bhagalpur. The said Maulvi has

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up to this time been serving me faithfully and conscientiously and he is acquainted with everything. He is therefore assigned the position of manager for life in addition to that of a trustee. His monthly salary for manager's work is fixed at Rs.250. Over and above this salary, proper conveyance charges shall be given to him, and travelling and daily diet expenses shall be given as in my time, or the trustees may make proper arrangement therefore (?) in such manner as they may think proper. In (case of) increase of the income of the estate, the trustees shall allow him such increment of salary as may be decided upon by them. This item of expenditure shall be a charge on my estate under the head—establishment charges. Travelling expenses both ways, etc., shall be paid to trustees Nos. 1 and 3 when they shall come over on business of the estate, and the same rule shall apply to the trustees living at a distance. This (item of) expenditure shall be a charge on my estate under the head—allowance to trustees."

The will purported to have been signed by the testator in the presence of Sarja Prasad and Satish Chandra Dey, and to have been acknowledged by the testator to Gauri Shankar Sahay. A note at the foot of the will is as follows: "I certify that I have read over and explained this will to the testator, who seemed to understand it perfectly," and it is signed by Jamal Khan, i.e., Jamaluddin. The will is signed in another place by Jamaluddin as the scribe of the document.

On July 24, 1923, the will was presented at the Sadar Registration Office, Bhagalpur, by Raghunandan, the testator, who was identified by Sarja Prasad.

In dealing with the rule laid down by the above mentioned cases—namely, *Barry v. Butlin*(1) and *Tyrrell v. Painton*(2)—and the question whether Jamaluddin took a benefit under the will, the learned judges of the High Court held that "the benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature." Their Lordships are not able to agree that the principle laid down in the above mentioned cases is limited to such a benefit

as that indicated by the learned judges of the High Court; but they are relieved from the necessity of discussing this matter at any length, for it was not seriously argued before them by learned counsel for the executors that Jamaluddin did not receive a benefit under the will in view of the fact that the testator had thereby appointed him manager of his estate for the period of his life at a monthly salary of Rs.250.

Their Lordships agree with the finding of the learned District Judge, which was to the effect that the undisputed facts of the case show that Jamaluddin took an active part in the preparation of the will, and inasmuch as, in their opinion, Jamaluddin did take a benefit under the will by reason of the provision in the twelfth paragraph of the will, by which he was appointed manager of the estate for life at a salary, the principle laid down by the above mentioned cases is applicable to this case, and these appeals must be decided in accordance therewith.

It will be sufficient to refer to the statements of the rule made by Lindley and Davey L.JJ. in *Tyrrell v. Painton*.(1)

“The rule in *Barry v. Butlin*(2); *Fulton v. Andrew*(3); and *Brown v. Fisher*(4) is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.” (Lindley L.J.)

“It must not be supposed the principle in *Barry v. Butlin*(2) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle

(1) [1894] P. 151, 157, 159.

(2) 2 Moo. P. C. 480.

(3) (1875) L. R. 7 H. L. 448.

(4) (1890) 63 L. T. 465.

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is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless that suspicion is removed." (Davey L.J.)

The material facts relating to the preparation and execution of the will are as follows:—

In July, 1923, the testator was ill; he had been an invalid for a considerable time, and he left his home in Bhagalpur on July 25, 1923, and went to Calcutta for treatment. As already stated, he died on August 31, 1923. It was alleged by Jamaluddin that a few days before the testator went to Calcutta he handed to Jamaluddin two or three pages of notes, written in Urdu by the hand of one Hasan Ali, who had acted as tutor to the testator when he was a boy, and that the testator instructed him to take the notes to a *vakil*, named Ranjit Sinha, for the purpose of having them put into the form of a will. Accordingly, on the evening of July 21, 1923, Jamaluddin took the notes to Ranjit Sinha, who dictated a draft of a will, which Jamaluddin wrote in Urdu.

On the morning of July 22, 1923, Jamaluddin is alleged to have taken the draft of the will to the testator, and at his request to have read it to the testator, who asked him to read some parts again and to explain them. This he did, and he then handed both documents to the testator. It is alleged by Jamaluddin that the provision appointing him manager for life at a salary was in the notes given to him by the testator and in the draft will dictated by Ranjit Sinha. Unfortunately, neither of these documents has been produced and Ranjit Sinha was not called as a witness. The explanation for the absence of the latter from the witness box was that he was appearing as *vakil* for the executors at the hearing of this case before the learned District Judge. Hasan Ali, the tutor, gave evidence, and said that he wrote the notes at the dictation of the testator, who kept what he had written. When cross-examined, he stated "that it was in the notes that Jamal would be a life manager on Rs.250."

On the next day—namely, July 23—according to the evidence of Jamaluddin, the testator gave the draft to him,

saying "There are some cancellations in it: copy it out again." It appears, however, from a later passage in his evidence that Jamaluddin made the cancellations in the draft at the order of the testator. Jamaluddin made a fair copy of the draft, but he omitted from the fair copy the paragraph relating to the appointment of trustees and to the appointment of Jamaluddin as manager of the estate for life. He alleged that he was told by the testator to omit that paragraph from the fair copy. The explanation given for the omission was that the testator wished Surja Prasad, the Government pleader at Bhagalpur, to be one of the trustees of the will, that he wished to consult Surja Prasad as to the will, and the testator feared that if Surja Prasad saw his name as trustee and executor he might refuse to give his advice. That evening Surja Prasad went to the testator's house, and the testator asked Jamaluddin to produce the fair copy of the will which he had made that day. Accordingly, Jamaluddin brought it and in the presence of the testator read it out.

The testator asked Surja Prasad to see that it was all right. Surja Prasad said he would see it next morning, whereupon the testator told Surja Prasad to take the draft away with him, and that he would send Jamaluddin in the morning. The next morning, i.e., on July 24, 1923, Jamaluddin went to the house of Surja Prasad, who suggested two alterations in the draft—namely, that the Rs.500 monthly to the daughters should be made an absolute estate of inheritance and that the grant for educational purposes should be specified. Jamaluddin, in reply to such suggestions, said that it was the testator's wish that the disposition should be as in the draft. Accordingly Surja Prasad did no more than make some verbal alterations and gave the draft back to Jamaluddin. The draft shown to Surja Prasad has not been produced, but there is no doubt that it did not contain the paragraph numbered 12 in the will relating to the appointment of trustees and manager. Jamaluddin took the draft back to the testator, who instructed him to make a fair copy and to add the paragraph as to the appointment of trustees and manager.

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There is no direct evidence that Jamaluddin reported to the testator the advice which Surja Prasad had given in respect of the two matters already referred to. It appears that Jamaluddin took upon himself to reject Surja Prasad's suggestions, relying on his own alleged knowledge of the testator's wishes.

Jamaluddin then made a final fair copy, including para. 12, and took it to the testator, read it out to him, and added and signed the certificate that he had read over and explained the will to the testator, who appeared to understand it perfectly.

In the afternoon of the same day Jamaluddin and Satish Babu went with the testator in a car to the Court. Surja Prasad was called, and the testator, sitting in the car, executed the will, signing his name on each page; this was done in the presence of Surja Prasad, Satish Babu and Jamaluddin. Gouri Babu was then called, and the testator admitted his signature to him. The will was then placed in an envelope, which was sealed. The testator, Surja Prasad and Jamaluddin went to the registry office, where the will was deposited.

Surja Prasad in his evidence said that he was aware: "That a man who takes substantial benefits under a will should not take part in its preparation, but I did not know until next day at the registration that Jamal took a benefit under it. That clause was not in the draft." In another part of his evidence Surja Prasad said: "I intend to renounce my executorship. It was after the registration that Jamal Babu told me I was down as a trustee and executor. I said that I ought to have been consulted first, and that I objected, since I was about to retire from my practice. No executor or trustee was in the draft shown to me."

From the above mentioned evidence it is not clear whether the information given by Jamaluddin to Surja Prasad as to the former taking a benefit under the will, and the latter being a trustee, was given in the presence of the testator. It is possible that it was; on the other hand, it is equally possible that it was not; and to assume that the information was given in the presence of the testator would be mere

guesswork. Surja Prasad did, in fact, refuse to act as trustee and executor.

In view of the above mentioned facts, in their Lordships' opinion there is ground for suspicion that the testator was not aware of the provision in clause 12 of the will by which Jamaluddin was appointed manager of the estate for life at the salary of Rs.250 per month, with the accompanying provisions for the payment of charges and expenses and the possible increase of salary. Indeed, it was not seriously argued by the learned counsel for the executors that there was no ground for suspicion. The point on which the learned counsel laid stress was that the evidence was amply sufficient to remove the suspicion and to satisfy the Board that the testator was aware of and understood all the provisions, including para. 12, of the will.

The learned counsel for the executors further argued that in any event probate should be granted of all the provisions in the will except that part of it which provided for the managership of Jamaluddin, and he relied on the decision in *Rhodes v. Rhodes*.⁽¹⁾

In their Lordships' opinion, there is no ground for holding that the testator was not aware and did not approve of all the provisions of the will with the exception of para. 12.

The question therefore is narrowed down to the consideration whether the testator approved and was aware of the provisions of para. 12. Their Lordships are satisfied that that part of the paragraph which deals with the appointment of the five trustees was in accordance with the testator's wishes. They are not, however, satisfied that the appointment of Jamaluddin as manager of the estate for life and the terms of such appointment were in accordance with his wishes or that he was aware of the provision in the will relating thereto.

It is not necessary for their Lordships to set out in detail all the reasons for holding that the suspicion in respect of the above mentioned provision has not been removed. It will be sufficient to refer to some of them.

(1) (1882) 7 App. Cas. 192.

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The evidence as to the existence of the above mentioned provision in any of the drafts made prior to the fair copy of the will, which was executed, is limited to the evidence of Jamaluddin and Hasan Ali, who was speaking merely from his recollection.

None of the material notes or drafts was produced. Ranjit Sinha, whose evidence would have been very important, was not called as a witness. There is no evidence beyond that of Jamaluddin, the interested party, that on the morning of July 24, 1923, the will was read to the testator or that he read it himself. There is no doubt that when the draft of the will was shown to Surja Prasad it did not contain para. 12 or any such provision. The explanation given in the evidence of Jamaluddin for its omission was to the effect that the testator did not wish Surja Prasad to know that he was to be a trustee. It is difficult to accept this as a sufficient and reasonable ground for withholding the provisions of that paragraph from the knowledge of Surja Prasad.

The position, therefore, in respect of this part of the case is that the clause in the will under which Jamaluddin was to receive a substantial benefit was by his action withheld from the knowledge of Surja Prasad, the Government pleader, whose advice was sought as to the will, and no satisfactory explanation is forthcoming for such action.

There are some grounds to support the opinion of the learned District Judge that it was at least doubtful whether the testator could have read the Urdu script in which the will was written. It is curious that Jamaluddin should have indorsed on the will the certificate that he had read it over and explained it to the testator, who seemed to understand it perfectly, if it were the fact, as alleged by Jamaluddin, that the testator could read the Urdu script and that he had, in fact, read the will for himself.

The above are some of the reasons which have actuated their Lordships in coming to the conclusion that the evidence is not sufficient to remove the suspicion attaching to the provision in question, and to satisfy them that the testator knew and approved of the said provision.

The result of their Lordships' conclusions is that probate should not be granted to that part of para. 12 which confers the benefit upon Jamaluddin; in other words, probate should not be granted in respect of that part of the paragraph which begins with the words "The said Maulvi has up to this time," and ends with the words "This item shall be a charge on my estate under the head—establishment charges."

This decision, however, does not mean that probate should be refused in respect of the remainder of the will: see *Rhodes v. Rhodes.*(1)

Their Lordships, therefore, are of opinion that the decrees of the High Court should be set aside and an order should be made that probate should issue in respect of the will with the exception of that part of para. 12 which has been heretofore specifically mentioned.

There remains the question of costs.

The appellant, Sarat Kumari Bibi, has succeeded in the appeal to His Majesty in Council, but to a limited extent only. She has been contending all through the proceedings that probate in respect of all the provisions of the will should be refused and that there should be an intestacy. In this contention she has failed. On the other hand, the executors have been contending all through the proceedings for probate in respect of all the provisions of the will. In this contention they have failed.

Their Lordships, therefore, are of opinion that there should be no order for costs as between the appellant and the executors in any of the proceedings, and that any costs paid under any orders of the Courts below ought to be returned, but that the executors should be at liberty to get their taxed costs out of the estate.

The position adopted by Rajdulari before the Board was that probate should be granted in the form and to the extent hereinbefore indicated. Consequently their Lordships are of opinion that the appellant should pay the costs incurred by Rajdulari in the High Court and in the proceedings before the Board.

(1) 7 App. Cas. 192.

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J. C. Their Lordships will humbly advise His Majesty accordingly.
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Solicitors for appellant: *Chapman-Walker & Shephard.*

Solicitors for respondents Nos. 1 to 4: *Watkins & Hunter.*

Solicitor for respondent Rajdulari: *G. L. Borradaile.*

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Dec. 3. DHIRENDRA NATH GHOSH AND OTHERS } RESPONDENTS.
— (PLAINTIFFS) }

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Sale for Arrears of Revenue—Permanently settled Estate—Adverse Possession as to Part of Estate—Rights of Purchaser—Estoppel—Party to Partition claiming Land decreed to another Party—Evidence—Thak Statements—Bengal Land Revenue Sales Act (XI. of 1859), s. 37—Transfer of Property Act (IV. of 1882), s. 43.

The executors of a deceased Hindu sued the widow of his brother for possession of land which the decree in a partition suit of 1898 had allotted to her, other family properties being thereby allotted to the brother since deceased. In 1908 he purchased a permanently settled estate at a sale under Act XI. of 1859 for arrears of revenue. The evidence showed that the land in suit had formed part of that estate at the permanent settlement, though by adverse possession it had become the property of the joint family, and had been so partitioned:—

Held, that as there had been no separate assessment of the land in suit it remained liable to be sold under s. 37 of the Land Revenue Sales Act, 1859, for arrears of revenue on the whole estate, and that the fact that it had been allotted to the widow by the partition decree did not estop the executors from claiming it by virtue of the purchase; it was not shown that at the time of the partition the brother, since deceased, had made any representation to the widow so as to bring s. 43 of the Transfer of Property Act, 1882, into operation.

Surja Kanta Acharjya v. Sarat Chandra Roy Chowdhuri (1914) 18 Cal. W. N. 1281 (P.C.) followed.

Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan (1919) 24 Cal. W. N. 321 (P.C.) distinguished.

* Present: VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH, and SIR JOHN WALLIS.

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Held, further, that in determining whether the land in suit had formed part of the permanently settled estate at the permanent settlement thak statements were admissible and of evidentiary value.

Jagdeo Narain Singh v. Baldeo Singh (1922) L.R. 49 I.A. 399, 407 explained.

Judgment of the High Court affirmed.

APPEAL (No. 117 of 1927) by special leave from a decree of the High Court (November 13, 1925) affirming a decree of the Additional District Judge of Faridpur (February 12, 1923).

The suit was brought by the respondents, as legal representatives of Upendra Nath Ghose, against the appellant, the widow of his brother, for possession of certain land which had been allotted to the appellant by the decreee in a partition suit of 1898 to which Upendra and his deceased brother were parties. The respondents' claim was by virtue of a purchase by Upendra in 1909 of a permanently settled estate at a sale for arrears of revenue; they alleged that the lands in suit formed part of that estate at the permanent settlement, and passed to the purchaser.

The Bengal Land Revenue Sales Act (XI. of 1859), s. 37, provides as follows: "The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement. . . ."

The trial judge decreed the suit, and his decision was affirmed on appeal by the High Court (Walmsley and Chakravarti JJ.).

1928. Oct. 23, 25, 26. *Sir George Lowndes K.C.* and *E. B. Raikes* for the appellant.

Dunne K.C. and *Wallach* for the respondents.

The arguments were mainly upon the facts. In addition to cases referred to in the judgment, reference was made to *Jagadindra Nath Roy v. Secretary of State for India*(1), as to the value of thak surveys as evidence.

(1) (1902) L.R. 30 I.A. 44.

J. C. Deo. 3. The judgment of their Lordships was delivered by
1928 SIR JOHN WALLIS. The facts of this case are somewhat
KRISHNA unusual. The plaintiffs, as executors of the late Upendra
PROMADA Nath Ghose, sue the defendant, Srimati Krishna Promada
DASI Dassi, his brother's widow, to recover certain lands which
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NATH GHOSH. described as taujik 1240, which the deceased Upendra
purchased at a revenue sale of this taujik for arrears of land
revenue in the year 1908.

In 1899 there had been a partition suit in the family of Upendra and of the defendant's deceased husband, and by the partition decree the immovable properties in Sch. 6 of the decree were allotted to Upendra and the immovable properties in Sch. 8 were allotted to the present defendant as her husband's widow. It is common ground that the lands allotted to the widow included the lands claimed by the plaintiffs in this suit. The plaintiff's case is that at the time of permanent settlement they formed part of what is now taujik, 1240, and that even assuming, which the plaintiffs do not deny, that the owners of 1240 had lost their title to these lands by adverse possession and under the law of limitation, that they had become the property of his own family and had been partitioned as such, they still remained liable for the rent or land revenue fixed on estate No. 1240, and were liable to be sold for failure to pay the land revenue fixed on this estate under s. 37 of the Land Revenue Sales Act, 1859. The new owners might, if they had so desired, have had the portion of estate No. 1240, which had passed to them by adverse possession, separately assessed to land revenue, but, as they had omitted to do so, it continued to form part of the security for the whole land revenue of estate No. 1240 and to be liable to be sold under the section already cited. In their Lordships' opinion this was clearly so, and has been so held by this Board in *Surja Kanta Acharjya v. Sarat Chandra Roy Chowdhuri*. (1)

This being so, the substantial questions in this suit are: Did the suit lands form part of estate No. 1240; and, if they

did, did the fact that in a partition suit these lands had been allotted to the defendant as the widow of Upendra's brother, Upendra himself receiving other properties as his share of the family property, estop his executors from enforcing against the defendant any title which he acquired to them as purchaser of estate 1240 at a revenue sale?

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It was held by both the lower Courts that the suit lands did form part of estate No. 1240, and that the plaintiffs, as executors of the deceased Upendra, were not estopped from suing for them.

The first question depends upon the proper inferences to be drawn from the revenue records which have been exhibited, consisting of registers, thaks or maps, and thak statements recorded when the thaks were made. The learned judges of the High Court—Walmsley J., a member of the Indian Civil Service, and Chakravarti J.—from their familiarity with the revenue system of Bengal, were necessarily in a better position than their Lordships are to draw the proper inferences from these records, and their Lordships would be very unwilling to interfere with their finding, affirming, as it does, the finding of the lower Court, unless it were clearly made out that it was vitiated by some error of law.

It was argued that both the lower Courts erred in acting on the thak statements, which were drawn up when the thaks or maps were made, and reference was made to a judgment this Board delivered by Mr. Ameer Ali in *Jagdeo Narain Singh v. Baldeo Singh* (1), in which it was observed that such statements had no evidentiary value. In their Lordships' opinion, it was not intended in that case to lay down that these statements could never have any evidentiary value, still less that they were inadmissible in evidence, but only that they were of no evidentiary value when, as in that case, they dealt with matter altogether outside the scope of the survey.

At the hearing of the appeal the findings of the lower Courts were only questioned with reference to the lands included in the first schedule to the plaint. It is in their Lordships'

J. C. opinion unnecessary to review the evidence on which the
 1928 Courts below have arrived at a concurrent finding. The
 —— lands in dispute were known as Jenidhaha, which was
 KRISHNA apparently the name of a village or hamlet. There was
 PROMADA DASI a good deal of evidence as to the way it had been dealt with
 —— DHIRENDRADHARA from the time of the permanent settlement, but it is sufficient
 NATH to say that Jenidhaha is entered both in the defendant's
 GHOSH. estate, tajik 6591 and in tajik 1240, which was purchased
 —— by Upendra in the general register of revenue-paying lands
 in estates borne on the revenue roll of the district of Faridpur,
 maintained under ss. 6 and 7 of Bengal Act VII. of 1876.

In their Lordships' opinion these entries, which were based on the earlier revenue records, raise the inference that Jenidhaha was included both in estate No. 1240 and in the estate from which the defendant's estate No. 6591 was separated when these estates were settled and the revenue fixed upon them. From these and other facts the lower Courts have drawn the inference that at the time of the permanent settlement of these estates they each had a share in Jenidhaha, and that consequently it was included in the tajik of each estate, and that, in the absence of any evidence to the contrary, it must be presumed that each estate was entitled to a half share in Jenidhaha.

From this conclusion their Lordships see no reason to differ, especially as it appears to have been not uncommon to include the same mauza in two estates when each of them had an interest. It was contended before their Lordships that there were two Jenidhahas, one of which was included in each estate in it, but in their Lordships' opinion this is not in accordance with the evidence and would not appear to have been the case put forward in the Courts below.

As regards the question of estoppel, the judgment of the Board in *Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan*(1) was cited, but in their Lordships' opinion that case is clearly distinguishable. In that case two brothers, who were Mahomedans, referred it to arbitrators to divide the estate of their deceased father between them, ignoring

the fact that their father's widow was entitled to a share in his estate. One of the brothers predeceased the widow, and the surviving brother, who was the heir to his mother's property, then sought to recover from his deceased brother's family half the share to which she should have succeeded on her husband's death. This, however, was not the footing on which the two brothers had gone to arbitration, and it was held by the Board that he could "not be allowed to come back and take as heir to his mother what was by his own act not allotted to her, but was divided between herself and his brother." That case has no resemblance to the present, in which lands belonging to the family were allotted to the defendant without regard to the fact that some of them were liable to be sold at a revenue sale for revenue due on another estate, a fact which was probably unknown to any member of the family. It really made no difference to the defendant whether they were purchased at the revenue sale by the plaintiff's or by a stranger.

Sect. 43 of the Transfer of Property Act was also referred to, but it has been held by the Subordinate Judge that it is not shown that Upendra made any representation to the defendant, and therefore there is no room for the operation of the section. This question of estoppel does not appear to have been pressed in the High Court, as it is not referred to in the judgment.

In their Lordships' opinion this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *W. W. Box & Co.*

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 -- ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Pre-emption—Decree obtained by Co-sharers jointly—Effect of Decree—Death of one Plaintiff pending Appeal—Failure to join Representatives—Reversal of Decree—Abatement—Rights of Representatives.

Where plaintiffs obtain a joint decree for pre-emption, without any adjudication under Order xx., r. 14 (2.), of their respective rights, they each have the right to pre-empt the whole property. If one of them dies pending an appeal, and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money in Court is paid over to the defendant with the consent of the surviving plaintiffs.

A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.

Judgment of the High Court I.L.R. 47 A. 100 varied.

APPEAL (No. 67 of 1927) from a decree of the High Court (July 11, 1924) varying an order of the Subordinate Judge of Bulandshahr.

The appeal arose out of a suit for pre-emption in which four plaintiffs obtained a joint decree and possession of the pre-empted property. On appeal the High Court had set aside the decree of the Court of first instance. In the execution proceedings for the restoration of the property that followed, it was discovered that the appeal had been heard and decided in the absence of the legal representatives of one of the plaintiffs who had died during the pendency of the appeal.

The facts of the case appear from the judgment of the Judicial Committee.

The High Court (in a judgment reported at I.L.R. 47 A. 100) held that the decree on appeal had abated wholly, not merely as against the present respondents, the representatives of the deceased plaintiff. The judgment was subsequently disapproved by the Full Bench in *Mahadeo Singh v. Talib Ali.*(1)

* Present: LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

(1) (1928) I.L.R. 50 A. 792.

1928. June 25. *De Gruyther K.C.* and *Dube* for the
appellant. *Hyam* for the respondents.

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Dec. 6. The judgment of their Lordships was delivered by

SIR JOHN WALLIS. In this case Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh, who were co-sharers in the village of Bighepur, filed a suit for pre-emption of certain land which the defendant Muhammad Wajid Khan, who is the present appellant, had purchased in the village. The sole question in the case was whether the custom of pre-emption obtained in the village, and the Additional Subordinate Judge of Aligarh having found this issue in favour of the plaintiffs gave them a decree for possession on their depositing the pre-emption money in Court. They duly deposited the money and obtained possession in execution of the decree.

It was suggested for the first time before the Board that the fourth plaintiff Pirthi Singh, who actually deposited the money in Court and obtained possession, was the only plaintiff who executed the decree, and that the right of the other decree-holders and their legal representatives to execute had become barred by limitation. In their Lordships' opinion there is no foundation for this contention. The application for execution of the decree, which was signed by all the four decree-holders, stated that the money had been deposited by them and prayed that possession might be given to them. The execution proceeded upon this basis, and in reply to objections subsequently raised by the defendant Pirthi Singh himself stated that the decree-holders had obtained possession. It is clear therefore that the deposit was made and possession obtained on behalf of all the decree-holders.

The defendant appealed to the High Court at Allahabad, making all the plaintiffs parties to the appeal. When the appeal came on for hearing Amar Singh, the third plaintiff, had been dead for about a year and his legal representatives had not been brought in the record. These facts were not brought to the notice of the Court, and the appeal was allowed to proceed on the footing that he was before the Court, and

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the appellate decree recites that he had been duly represented at the hearing, whereas in fact he had died and the authority to represent him had determined. Their Lordships are not in a position to say how this regrettable omission came about, and will only observe generally that it cannot be too clearly understood that a practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the Court to bring to its notice if he is aware of it the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him. Had the Court been apprised of the fact, as it should have been, the questions now before the Board could have been decided at hearing of the appeal and this subsequent litigation would have been unnecessary.

As it was, the surviving respondents allowed the appeal to be heard without objection in the absence of the third plaintiff and his legal representatives, thus taking the chance of succeeding on the merits; and when they had failed and the decree of the lower Court had been reversed and the suit dismissed and the defendant had obtained formal restitution of possession in execution of the appellate decree, they joined with the representatives of the deceased third plaintiff in putting in the application to the Subordinate Judge, which is the subject of this appeal to His Majesty in Council, objecting that the whole appeal had abated by reason of the representatives of the third plaintiff not having been brought on the record within the time limited by law and that the appellate decree was a nullity and did not entitle the defendant to restoration of possession. They accordingly prayed that the order which the defendant had obtained without notice to them might be set aside and that they might be put in possession again.

On this application the Subordinate Judge ruled that the three surviving plaintiffs had no locus standi, as under the provisions of the Code of Civil Procedure the appeal had only abated as to the deceased plaintiff, and the survivors were bound by the appellate decree. As against the representatives of the deceased plaintiff he held that by

reason of the abatement the appellate decree was not binding on them and that they were entitled to possession in execution of the decree of the first Court, if the other plaintiffs acquiesced in the pre-emption money, which was still in Court, being paid to the defendant, which they did by their counsel at the hearing of the appeal from this order, as stated in the judgment of Mukerji J. In other words, he held that the defendant was not entitled to restoration of possession as against them if they were prepared to pre-empt him.

The defendant and the surviving plaintiffs both preferred appeals against this order and the defendant also applied to the High Court under Order XLVII. of the Civil Procedure Code for a review of the appellate judgment, and an order that the abatement should be set aside and the appeal re-heard in the presence of the representatives of the deceased respondent. The Court rejected the grounds for review put forward by the defendant and held that the allegation that there had been a conspiracy to conceal the death of the third plaintiff from the appellant was not made out, and that he knew of the death and had been guilty of laches. They accordingly refused to set aside the abatement and dismissed the application for a review of judgment.

Consequently, as regards the deceased plaintiff, the abatement stands and cannot now be questioned.

The appeals from the order of the Subordinate Judge subsequently came on for hearing, when the two learned judges differed, Mukerji J. being of opinion that under the provisions of the Code of Civil Procedure the appeal had abated as regards the deceased third plaintiff and no further, and that by virtue of the abatement his representatives were entitled to a one-fourth share of the property; while Dalal J. held that the whole appeal had abated and that the surviving plaintiffs also were entitled to be restored to possession. In consequence of this difference of opinion there was a reference under s. 98, sub-s. 2, of the Code of Civil Procedure to another Bench, which held that the whole appeal had abated and that the appellate decree was incapable of execution.

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In accordance with this answer to the reference the defendant's appeal, No. 202 of 1923, was dismissed, and the appeal of the surviving plaintiffs, No. 281 of 1923, was allowed, and they were restored to possession.

The defendant then obtained leave to appeal to His Majesty in Council from the order of the High Court dismissing his appeal, No. 202 of 1923.

In dealing with the questions which arise in this appeal it is desirable in their Lordships' opinion to refer in the first place to the scope and nature of the present suit. Where the custom of pre-emption obtains in a village every co-sharer has a right to pre-empt a stranger purchasing land in the village. When several co-sharers desire to exercise this right, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision, not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in Order xx. of the Code of Civil Procedure, r. 14 (2.), in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption, as in the present case, without asking the Court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in Court. In their Lordships' opinion the effect of that decree is to establish, as against the defendant, the right of each of the plaintiff co-sharers to pre-empt him and to entitle them to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured to him.

This being the nature of the suit and the effect of a decree for the plaintiffs, if the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates as against him under the express provisions

of Order xx. of the Civil Procedure Code, r. 4 (3.), read with r. 11, because his legal representatives have not been brought on the record within the time limited by law, and the appeal is heard in the absence of the legal representatives of the deceased respondent, and the decree of the first Court is reversed and the suit dismissed as against all the plaintiffs, it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right of pre-emption which the decree of the first Court established in his favour against the defendant, that is a right to pre-empt the whole. A stranger-purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it; and their Lordships are therefore unable to accept the view of Mukerji J. in the High Court that in the circumstances of this case the representatives of the deceased plaintiff only became entitled to pre-empt one-fourth of the suit property, leaving the defendant in possession of the remainder. They do not find any satisfactory grounds on which such a limited right can be based.

These were substantially the grounds on which the Subordinate Judge ruled against the defendant, and their Lordships prefer this view to that taken by the majority of the learned judges in the High Court that in this suit the abatement against the deceased plaintiff made it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs, and rendered the judgment and decree of the appellate Court passed in the absence of the representatives of the deceased plaintiff a complete nullity, so that the surviving plaintiffs were entitled to be restored to possession in accordance with the decree of the first Court along with the representatives of the deceased plaintiff. With this view their Lordships are unable to agree.

In their Lordships' opinion the order of the Subordinate Judge was right, and the decree of the High Court dated July 11, 1924, ought to be set aside and in lieu thereof it ought to be declared that the representatives of the third plaintiff—fourth and fifth respondents here—are entitled

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to re-delivery of possession, on condition that the money deposited in Court should be made over to the appellant with the consent of all the other respondents within three months of the date of the order herein, otherwise the suit is to be dismissed; but that there ought to be no costs either in the High Court or of this appeal, and any costs paid under the decree ought to be returned. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

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RAJA UDIT NARAYAN SINGH, SINCE DECEASED } APPELLANT;
 AND
 MUBARAK ALI AND OTHERS } RESPONDENTS.
 ON APPEAL FROM THE BOARD OF REVENUE FOR THE UNITED PROVINCES OF AGRA AND OUDH.

Appeal to Privy Council—Competence of Appeal—Order of Board of Revenue—Thikadar—Dispute as to Entry in Register—Incidental Dispute as to Tenure—Land Revenue Act (U. P. Act III. of 1901), ss. 32, 42, 44.

A thikadar registered under the United Provinces Land Revenue Act, 1901, purported to transfer his thika to his son and grandson, who applied for mutation of names. The superior proprietor, being given notice, objected that the thika had been forfeited by the transfer, and that the transferees were merely tenants. The Assistant Collector upheld that contention. The transferor thereupon brought a civil suit against the transferees and obtained by consent a decree that the gift was incomplete and passed no title. He then appealed in the mutation proceedings, and eventually the Board of Revenue ordered therein that the transferor should be re-entered as thikadar. The superior proprietor appealed to the Privy Council:—

Held, that the appeal did not lie. A thikadar being a "proprietor" within the meaning of s. 32 of the Act above mentioned, the dispute was one as to an entry in the register maintained under s. 32 (a), and while by s. 44 the decision did not bar a civil suit, no appeal to the Privy Council was given. The dispute not being under s. 32 (e) it was not necessary to decide whether s. 42, which provides that the Code of Civil Procedure shall apply to the trial of particular disputes within s. 32 (e), had in those disputes the effect of giving a right of appeal under the Code.

* Present: LORD PHILLIMORE, LORD ATKIN, LORD SALVESEN, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

APPEAL (No. 140 of 1927) from an order of the Board of Revenue of the United Provinces of Agra and Oudh (December 9, 1925) reversing an order of the Commissioner, Fyzabad Division.

The facts of the litigation and the orders made by the Revenue Courts therein appear from the judgment of the Judicial Committee.

Shortly before the hearing of the present appeal the respondents gave notice to the appellant contesting the competence of the appeal; that question only was argued upon the appeal coming on for hearing.

1928. Nov. 12, 16. *Dunne K.C.* and *Jopling* for the respondents. This appeal does not lie. Having regard to the explanation added to s. 32 of the Land Revenue Act, the application was for entry in the register kept under s. 32 (a) of the latter Act, not under s. 32 (e). There was no dispute as to the "class or tenure of any tenant" within s. 42. The superior proprietor should not have been joined. Any dispute which arose in consequence ceased to be material when the transfer was declared by a civil Court to be a nullity. The order now appealed from had reference solely to the register under s. 32 (a). Under the Land Revenue Act, ss. 40, 44, entry in the register did not preclude a civil suit, and there is no provision applying the Code of Civil Procedure or giving a right of appeal to the Privy Council. In these circumstances no appeal lies: *Rangoon Botatoung Co. v. Collector of Rangoon.* (1)

De Gruyther K.C. and *E. B. Raikes* for the appellant. The litigation was a dispute "respecting the class or tenure of a tenant" within s. 42 of the Land Revenue Act. As to such disputes that section provides that the procedure under the Oudh Rent Act, 1886, is to be followed, and by s. 135 of that Act the Code of Civil Procedure is applied. Consequently the provisions of the Code as to appeals to the Privy Council operate. Appeals to the Privy Council from the Board of Revenue have been heard and reported: *Parbati Kunwar*

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Dunne K.C. in reply. The two cases in which appeals from the Board of Revenue were heard were of an entirely different nature from the present case; further, the competence of the appeals was not argued. Even if there was a dispute within s. 42, that section provides that the procedure under the Rent Act is to apply "in the trial" of the dispute; that does not make applicable the provisions of the Code as to appeals to the Privy Council.

Dec. 17. The judgment of their Lordships was delivered by

SIR JOHN WALLIS. In this case the Board of Revenue of the United Provinces granted Raja Udit Narain Singh, since deceased, who will be referred to as the appellant, leave to appeal to His Majesty in Council from their order directing that the first respondent, Shaikh Mubarak Ali, should be re-entered on the register maintained by the revenue authorities under the United Provinces Land Revenue Act III. of 1901, as a thikadar or holder of a permanent but not transferable lease in a village of which the appellant was the proprietor.

The first respondent had purported to transfer his thika or lease to his son and grandson, the second and third respondents, with the object, it was alleged, of defeating the rights of succession of his other heirs under the Mahomedan law. On their application for mutation of names they were erroneously entered as pukhtadari tenants, a term applicable to tenants holding under a sub-settlement. They then applied that they might be entered as matahatdars, a description applicable to under-proprietors or persons holding a heritable and transferable right in the land, as defined in cl. 15 of s. 4 of the United Provinces Land Revenue Act III of 1901. The revenue authorities corrected the register but entered them as thikadars, the description under which their transferor, the first respondent, had been entered.

(1) (1918) L.R. 45 I.A. 111. (2) (1922) L.R. 49 I.A. 262.

(3) (1924) 11 Oudh L. J. 687.

They then applied to the Assistant Collector, who ordered notice to go to the appellant as the superior proprietor. The appellant appeared and objected that the permanent lease had been forfeited by the transfer and that the transferees were at most mere tenants. The Assistant Collector upheld this contention and directed them to be registered as tenants (which, as will be seen, means tenants of the lands actually cultivated or otherwise occupied by them), that is to say, he upheld the appellant's contention that the thika had been forfeited and that they were not entitled to be entered either as thikadars or as matahatdars.

The first respondent thereupon sued the second and third respondents for a declaration that his gift to them was incomplete and no title had passed, and obtained a decree by consent. He then appealed to the Deputy Commissioner, who ordered the second and third respondents to be registered as thikadars. This order, on appeal by the appellant here, was reversed by the Commissioner, who restored the order of the Assistant Collector. The first respondent then appealed to the Board of Revenue, who, after making the second and third respondents, parties here, respondents in that appeal, held that transfer in their favour was invalid and directed that the name of the first respondent should again be entered as thikadar. It was from this order that the appellant obtained leave to appeal to His Majesty in Council.

At the hearing before their Lordships, Mr. Dunne took a preliminary objection that no appeal lay, and Mr. De Gruyther, for the appellant, contended that the order under appeal had been made in the course of an inquiry as to "a dispute respecting the class or tenure of any tenant" within the meaning of s. 42 of the Land Revenue Act, as to which it is provided that the Collector in the trial of the dispute is to observe the procedure prescribed for cases of a similar kind for the trial of suits under the Oudh Rent Act XXII. of 1886. As by s. 135 of that Act, save as otherwise provided, the provisions of the Code of Civil Procedure are applied to all suits and proceedings under that Act, Mr. De Gruyther contended that the provisions of the Code as to granting leave

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to appeal to His Majesty's Council were applicable to the present case. For the respondents it was contended that s. 42 was not applicable, and, even if it were, it merely directed the Collector in the trial of the dispute to observe the provisions of the Civil Procedure Code, and did not provide that that procedure should be observed as to appeals from his order.

It is unnecessary to deal with the latter contention, because, in their Lordships' opinion, the dispute was about an entry in the register maintained under cl. (a) and not under cl. (e) of s. 32, and because disputes about entries in register maintained under cl. (a) are to be decided, not in accordance with the provisions of s. 42, but in accordance with the provisions of s. 40, which does not make any of the provisions of the Civil Procedure Code applicable.

These sections are to be found in chapter III. of the Land Revenue Act, "Maintenance of Maps and Registers," and come under the sub-heading "Registers." Sect. 31 requires lists to be prepared and maintained of all revenue-paying mahals, or revenue divisions, specifying the revenue assessed and the person by whom it is payable, and also of all revenue-free mahals.

Then comes s. 32, which provides that for every mahal or village in a mahal there is to be a record-of-rights, which is to include the following registers:—

"(a) A register of all the proprietors in the mahal, including the proprietors of specific areas, specifying the nature and extent of the interest of each;

(b) in Oudh, for all mahals or pattis held in sub-settlement or under a heritable non-transferable lease, the rent payable under which has been fixed by the Settlement Officer or other competent authority, a register of all the under-proprietary co-sharers or co-lessees, specifying the nature and extent of the interest of each of them;

(c) in Oudh, a register of all other under-proprietors in a mahal, and all other lessees whose rents have been fixed by a Settlement Officer, or other competent authority, specifying the nature and extent of the interest of each of them;

(d) a register of all persons holding land revenue free, specifying the nature and extent of the interest of each;

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(e) a register of all persons cultivating or otherwise occupying land specifying the particulars required by section 55.

Explanation.—In this section the words 'proprietor' and 'under-proprietor' include a person in possession of proprietary or under-proprietary rights under a mortgage or lease."

Now a thikadar, who is referred to in s. 3 (10.) of the Oudh Rent Act, as "a person to whom the collection of rents in a village or portion of a village has been leased by the landlord" is clearly a person in possession of proprietary rights under a lease within the meaning of the explanation, and so to be entered in the register of proprietors under (a); and it is also clear that the dispute between the appellant the proprietor and the respondents was, whether after the transfer by the first respondent to the second and third respondents the thika had not been forfeited so that neither the first respondent, the transferor nor the second and third respondents were entitled to be entered in that register.

It is also clear that merely as thikadars they would not be entered in register (e), as contended for the appellant. Sect. 55 provides that the register maintained under (e) shall specify as to each tenant the nature and class of his tenure, as determined by the Oudh Rent Act, and the rent payable by the tenant, and shall also specify the proprietors or under-proprietors (if any) holding land as sir (or home farm land), or cultivating land, not being sir, otherwise than as tenants, and stating with regard to the latter class of lands the number of completed years during which they have been so cultivated. It is clear, therefore, that proprietors and under-proprietors and those claiming under them by lease or mortgage are not to be entered in this register, except in so far as they themselves actually occupy or cultivate land in the village, and that it cannot otherwise include persons in possession of proprietary rights under a mortgage or lease such as a thikadar.

It has next to be considered how disputes as to entries in register (a) are to be decided. Sect. 33 requires the Collector

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to record in the registers all changes that may take place and any transaction that may affect any of the rights and interests recorded. And under s. 34 every person obtaining possession by transfer of any proprietary right in a mahal, or part of a mahal, or the profits thereof, or in any specific area therein, which is required to be recorded in registers (a) to (d) of s. 32, is required to report the transfer, and no Revenue Court is to entertain a suit or application by him until he has done so. If there is a dispute about the transfer s. 35 requires the tahsildar to refer the case to the Collector, who is to dispose of it after deciding the dispute in accordance with the provisions of s. 40.

Sect. 40 provides that all disputes as to entries in the annual registers are to be decided on the basis of possession, and if the Collector cannot satisfy himself as to which party is in possession, he is to ascertain by summary inquiry who is the person best entitled to the property and shall put such person in possession, but no order as to possession under this section is to bar anybody from establishing his right to the property in any civil Court; and it is further provided by s. 44, that no entry or decision under s. 40 is to affect the right of any person to claim and establish in the civil Court any interest in land which requires to be recorded in the registers (a) to (d) of s. 32.

It is in their Lordships' opinion clear that all the Collector could do besides amending the register after the summary inquiry under s. 40 was to put the successful party into possession, and that his order would not debar the unsuccessful party from asserting his rights by suit in a civil Court. It is therefore not surprising that there is no provision of law making the summary inquiry under s. 40 subject to the Civil Procedure Code so as to render the order made by the Board of Revenue in such an inquiry appealable to His Majesty in Council.

In this view it is unnecessary to consider the effect of the provisions of s. 42, which applies the provisions of the Code of Civil Procedure to the trial of particular disputes as to certain entries to be made in the register maintained under

cl. (e)—apparently because under s. 44 the decision is to be binding on Revenue Courts which have exclusive jurisdiction in suits relating to the same matter.

In their Lordships' opinion the appellant has failed to show any right to appeal to His Majesty in Council, and the appeal should be dismissed with costs, save only that the costs of preparing and lodging the respondents' case must be borne by the respondents themselves, as the objection was only taken at the hearing. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondents : *H. S. L. Polak.*

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L. P. E. PUGH APPELLANT; J. C.*
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ON APPEAL FROM THE HIGH COURT AT PATNA.

Limitation—Conversion—Conversion without Dishonesty—Joint Tortfeasors—Assignment of Mining Lease—Coal raised outside demised Land—Royalties paid to Assignor—Suit against Assignor and Assignee—Indian Limitation Act (IX. of 1908), Sch. I., art. 48.

In 1915 the appellant acquired a coal mining lease granted by a zamindar over a property called P., together with the benefit (if any) of a sanad by which the zamindar had agreed to lease an adjoining 20 bighas, part of property G., conditionally on that lease being executed within a time which had then expired. The appellant continued until January, 1917, encroachments already made in the 20 bighas, believing that he had a promise from the zamindar of an extension of the sanad. The zamindar had however leased G. in 1914 to the respondents. In September, 1917, the appellant, without notice of the lease of 1914, sub-let P. for the whole of the residue of his term, with the benefit of the sanad. The sub-lessees agreed to pay royalties upon the demised premises, and he indemnified them against claims in respect of his encroachments. The sub-lessees continued the workings under the 20 bighas, and paid the appellant royalties upon the whole coal raised by them without distinguishing between that from P. and that from the 20 bighas. In June, 1920, the respondents sued the appellant

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and his sub-lessees for conversion of coal raised by the sub-lessees from the 20 bighas. Both Courts in India held the appellant jointly liable.

By the Indian Limitation Act, 1908, Sch. I., art. 48, the period of limitation for a suit "for specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same" is three years from the time when the plaintiff "first learns in whose possession" the property is. By art. 49 the period for a suit "for other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same" is three years from the date of the cause of action:—

Held, (1.) that art. 48 applied, as "conversion" in the article included all conversions, whether "dishonest" or not, and that accordingly no part of the claim was barred; but (2.) that the appellant was not liable, as there was no evidence constituting him a joint tortfeasor with the other defendants, who were in effect assignees of the lease to him.

Lodna Colliery Co. v. Bipin Behari Bose (1920) 55 Ind. Cases, 113 approved.

Doe v. Harlow (1840) 12 Ad. & E. 40 distinguished.

Decree of the High Court varied.

APPEAL (No. 30 of 1927) from a decree of the High Court (December 22, 1925), affirming, subject to a modification, a decree of the Subordinate Judge of Purulia (November 26, 1921).

On June 26, 1920, parties represented by respondents Nos. 1 to 4 brought a suit against the appellant and two other defendants, for an injunction and for damages in respect of coal extracted from lands of which the plaintiffs were lessees and under-lessees. They alleged that they first knew of the encroachments in June, 1919. The present appellant was defendant No. 3. The coal had been extracted by defendants Nos. 1 and 2 by encroachments from lands held by defendant No. 1 from defendant No. 3 as under-lessee of the whole of his lessee interest, and under-leased to defendant No. 2.

The defendants in addition to other defences pleaded limitation.

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge granted an injunction and decreed damages against the three defendants.

The present appellant alone appealed to the High Court, which affirmed the decree subject to a modification in the damages awarded. The learned judges (Adami and Sahey JJ.) rejected the plea of limitation, holding that the suit was governed by the Indian Limitation Act, 1908, Sch. I., art. 48, and that it had been brought within three years of the time when the plaintiffs first knew of the encroachment. They agreed with the trial judge that the defendants had acted in good faith, and honestly. They held the appellant liable in damages together with the other defendants on the authority of *Doe v. Harlow*.(1)

1928. Nov. 19, 20. *De Gruyther K.C.* and *F. E. Farrer* for the appellant. The suit was governed by art. 39, or possibly art. 49, of the Indian Limitation Act, 1908, Sch. I.; in either case the three years' period ran from the time when the coal was extracted. The Courts in India erroneously held that art. 48 applied, and consequently that time ran only from the date when the plaintiffs first knew of the encroachments. A consideration of the terms of the various articles shows that art. 48 applies only to a "conversion" which is "dishonest"; the word "dishonest" governs "conversion" as well as "misappropriation." That view is further supported by the position of the commas in the official print of the Act. *Lodna Colliery Co. v. Bipin Behari Bose*(2), which was followed, was wrongly decided.

But in any case this appellant was not liable. The suit was not for an account of profits received by him, but a suit for damages for trover. He was not, however, the principal of the other defendants, nor a joint tortfeasor with them. There was no evidence that the appellant knew of the encroachments by the other defendants. Although he received royalties upon all the coal extracted, there was nothing to show him that part of the coal was from the land encroached upon. The sub-lease given by the appellant provided for royalties upon coal from the "demised land" only. In *Doe v. Harlow*(1), which was relied on, the only question was whether

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(1) (1840) 12 Ad. & E. 40.

(2) (1920) 55 Ind. Cases, 113.

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there was any evidence to support the verdict of the jury, Lord Denman expressly said that the result would have been otherwise if the defendant had merely put the trespassers into possession. The facts of the present case are similar to those in *Thomas v. Atherton*. (1) In delivering the judgment of the Court in that case James L.J. said that had the matter not been concluded by an award but had proceeded to trial, the defendants would undoubtedly have succeeded. The appellant having demised for the whole of his unexpired term was in law an assignor of the lease. [Reference was made also to *Powell v. Aiken*. (2) and *Elias v. Griffith*. (3)]

Sir George Lowndes K.C. and *Wallach* for respondents Nos. 2, 3 and 4. The terms of the lease executed by the appellant and the facts afford ample evidence that the appellant intended the other defendants to encroach, and encouraged them to do so. He denied the title of the plaintiffs, and maintained that position in his case in this appeal. The document executed by the appellant was a lease within s. 105 of the Transfer of Property Act, not an assignment of the appellant's lease. The observation in *Thomas v. Atherton* (1) was obiter; in any case the facts of that case were dissimilar. The appellant was "privy to" the encroachment, and was therefore liable on the authority of *Powell v. Aiken*. (2) Art. 48 was rightly held to apply. "Conversion" in that article includes a conversion without dishonesty. Otherwise movable property taken by mistake cannot be recovered if the owner does not discover for three years who has it. There is no specific provision in art. 49 as to conversion without dishonesty. No weight can be attached to the position of the commas in the print of the Act: *Duke of Devonshire v. O'Connor*. (4)

De Gruyther K.C. replied.

Dec. 14. The judgment of their Lordships was delivered by **LORD WARRINGTON OF CLYFFE**. The suit in which the present appeal arises was, so far as is material to the appeal,

(1) (1878) 10 Ch. D. 185, 199.

(3) (1878) 8 Ch. D. 521.

(2) (1858) 4 K. & J. 343.

(4) (1880) 24 Q.B.D. 468, 478.

an action of trover, the plaintiffs claiming damages for the conversion by the defendants of specific movable property—namely, coal wrongfully gotten from the plaintiffs' mines and sold or otherwise disposed of by the defendants to their own use.

The appeal is by one defendant only—the defendant Pugh—and he raises two points of law: (1.) that the claim in respect of his own personal working is barred by the Limitation Act, and (2.) that, as to workings by his lessees, he has wrongly been held to be jointly liable with them, whereas in this respect the plaintiffs' suit ought to have been dismissed as against him.

The plaintiffs' claim alleged fraud as against all the defendants, but this issue was found against the plaintiffs by the trial judge, and this finding is not questioned now.

On the first of the two points of law referred to above the trial judge decided against the defendant Pugh, holding that the case fell within art. 48 in the first schedule to the Indian Limitation Act, 1908, and accordingly the period of limitation began to run not from the time when the property in question was wrongly taken, but from the time when the plaintiffs first learnt in whose possession the property was. This point was not raised in the appeal to the High Court, but no objection was taken to its being raised before the Board.

The second of the two points was decided against the appellant by both the Courts in India. There were two concurrent findings, but the appellant contends that such findings were wrong in law, inasmuch as the learned judges misdirected themselves, and there was in truth no evidence which would justify their findings.

The plaintiffs have in the suit established as against the defendants their right to the coal in an area called by various names, but referred to in the appellant's case and in this judgment as Gaurigram, under a mining patta dated April 3, 1914, granted by the Raja.

The appellant, under a purchase deed dated February 5, 1915, acquired from a company called the Kohinoor Coal Company, Ltd., its liquidators and mortgagees, certain mining

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rights granted by the Raja in 1908 in an area called Pathargarda, adjoining part of the western boundary of Gaurigram, together with the benefit, if any, of a sanad of September 16, 1913, therein mentioned, and to be referred to presently.

By an indenture dated September 3, 1917, the appellant granted, demised and leased to the defendant Bagchi such right, title and interest as he had in (amongst other places) Pathargarda, together with the benefit of and rights under the above mentioned sanad of September 16, 1913.

By an indenture dated September 3, 1919, the interest of Bagchi in Pathargarda was assigned by him to the defendants, Pilcher & Co., Ltd.

To return now to the sanad of September 16, 1913, and the story connected with it. By that document the Raja for value promised to grant to the Kohinoor Company above mentioned settlement of 20 bighas of coal within Gaurigram within four months of its date, and that the Company should have a lease similar to its Pathargarda lease. The sanad contained the following condition: "If the mining lease is not executed and registered within the said four months, you shall not be competent to make any claim for obtaining this settlement. I shall be competent to settle the said land with any one else according to my sweet will." This condition was not performed by the Kohinoor Company.

The plaintiffs at the date of the mining patta of April 3, 1914, had no notice of the sanad of September 16, 1913.

The conveyance of February 5, 1915, to the appellants of the mining rights in Pathargarda recited the sanad with the condition above referred to, and stated that no lease had ever been executed in accordance therewith, but, as above mentioned, included in the property and rights conveyed "the benefit, if any, of the sanad."

The appellant on taking possession under his conveyance found that the Kohinoor Company had extended its workings into Gaurigram. Having no notice of the grant to the plaintiffs or their predecessors of the grant of April 3, 1914, he immediately approached the Raja for the purpose of obtaining from him, if possible, an extension of the sanad.

He believed that he had obtained a promise to this effect, and in this belief and still without notice of the plaintiffs' rights, continued the workings under the 20 bighas referred to in the sanad. It was not until June 23, 1919, that the appellant heard of the grant of April 3, 1914, and then realized that a lease of the mining rights within the 20 bighas in Gaurigram could not be obtained. By this time, as mentioned above, he had parted with his interest in Pathargarda by the grant of September 3, 1917, to Bagchi.

The appellant's workings in Gaurigram ceased in January, 1917. The suit was begun on June 26, 1920.

On the question whether the Courts in India were right in holding that the appellant was jointly liable with Bagchi and Pilcher & Co., Ltd., respectively, for their workings in Gaurigram, it is necessary to mention a few further facts.

The deed of September 3, 1917, was, in their Lordships' opinion, an assignment of the appellant's rights and interests under his conveyance of February 5, 1915, and not a mere under-lease. It is true that the appellant is therein described as "lessor" and Bagchi as "lessee," but the grant is of the whole of his interest. No sub-term is created and therefore no reversion expectant on a sub-term.

To this deed was annexed a copy of the deed of February 3, 1915, which showed clearly that the rights under the sanad had expired. The deed reserved to the appellant royalties in respect of coal "raised from the demised premises." It contained a covenant by the appellant to keep the lessee, his estate and effects indemnified against, amongst other things, the encroachments (if any) already committed or made by the appellant in working the collieries, and a further covenant that he would use his best efforts to obtain from the Raja a lease of the additional 20 bighas adjoining Pathargarda.

Royalties have been received by the appellant under the last mentioned deed in respect of coal raised from the colliery generally without distinction as to the particular portion from which such coal was raised.

Their Lordships now proceed to consider the two points raised by this appeal.

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First, was the action against the appellant in respect of his own workings barred by the Indian Limitation Act, 1908? It is agreed that, if art. 48 applies to the case, the action is not so barred.

The action was clearly one of trover, and the damages awarded were damages for conversion of specific movable property—namely, the coal when separated from the land, the conversion consisting in the fact that the appellant converted such coal to his own use by selling or otherwise disposing of it. The Courts in India have held that he acted in the honest belief that he had obtained or would obtain sufficient authority for what he did. The conversion, therefore, was not dishonest.

The schedule to the Act contains two material articles: "Description of Suit. Art. 48: For specific movable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same. Art. 49: For other specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same. In each case the period of limitation is three years."

Under art. 48 the time from which the period begins to run is "when the person having the right to the possession of the property first learns in whose possession it is," and under art. 49 "when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

In their Lordships' opinion the decision of the trial judge in this case is correct, and art. 48 is the article that applies. The two articles are the only ones that apply to claims in respect of specific movable property. Art. 48 alone refers to conversion, and their Lordships can see no ground for splitting up conversion into two classes, one dishonest and the other not dishonest. If such were the intention one would have expected to find such a distinction between different classes of the same tort made clear by the express inclusion in art. 49 of the second of the two classes. The truth is that, if the article is read without the commas inserted in the print, as a court of law is bound to do, the meaning is reasonably

clear. "Conversion," a well known legal term for a particular class of tort, is referred to as one of the modes by which specific movable property may be wrongfully acquired, the others being theft and dishonest misappropriation. The opposite view involves giving a different effect to "or" preceding conversion to that which it has before "dishonest misappropriation." In fact, in each case it is equivalent to "or by."

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If this view is not correct, then there is no reference to what one may call simple conversion except by general words. On this point their Lordships agree with the careful judgment of Das J. in *Lodna Colliery Co. v. Bipin Behari Bose*.⁽¹⁾ The learned judge said (1): "Art. 48 deals only with specific movable property which falls under one of two classes, viz., (1.) such property as has been lost, or (2.) as has been acquired by (a) theft, (b) dishonest misappropriation, or (c) conversion. No other kind of movable property is affected by this article."

It is true, he goes on to say, that in his opinion the defendant's conduct was equivalent to theft, but he adds a passage which shows clearly that he would have come to the same conclusion in a case of simple conversion: "The plaintiff's complaint is that the defendant has without authority taken possession of the coal belonging to the plaintiff with the intention of asserting some right or dominion over them. The plaintiff company is therefore charging him with conversion. . . . It will be noticed that the word 'conversion' is used by the legislature in art. 48; it finds no place in art. 49. It must be presumed that when the legislature has deliberately used a term which has a known legal significance in law it has attached to that term that known legal significance."

Foster J. stated that on legal points he agreed fully with the judgment of Das J.

Their Lordships have not been referred to any other Indian case which deals with the precise question. They are of the same opinion as that expressed by Das J., and the appeal on this point therefore fails and ought to be dismissed.

Secondly, as to the question whether the appellant can be

(1) 55 Ind. Cases, 113, 133.

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made jointly liable for the acts of Bagchi and Pilcher & Co., Ld., respectively.

The trial judge so held on the ground that his position as lessor would render him liable, and cited *Doe v. Harlow*(1) as his authority. In the High Court Adami J. did not dissent from this view, but added that in his view there were facts which established an encouragement of the wrongdoers on the part of the appellant, and that this fact was sufficient to render him liable for their acts.

In their Lordships' opinion the learned judges in both Courts have misapprehended the question they had to try—namely, whether the appellant was a joint tortfeasor with Bagchi and Pilcher & Co., Ld., respectively. Neither the fact that he was their lessor—assuming, contrary to their Lordships' view, that he was a lessor in the proper sense of the term—nor that he “encouraged” the wrongdoers, whatever this may mean, would be sufficient by itself to support a finding that he was a joint tortfeasor.

Doe v. Harlow(1) is certainly no authority for the view expressed in the Courts below. It established no principle at all. The question there was whether there was some evidence against one of two persons charged as tortfeasor with having wrongfully kept the plaintiff out of possession of certain premises. The one in question was Warren; he had let the premises to Harlow, who held over after the cesser of Warren's term. The plaintiffs demanded possession from them both, and both refused. The Lord Chief Justice held that there was some evidence against Warren, and he left it to the jury to say on the case against all how long the three had been jointly keeping out the rightful proprietors. On a motion for a new trial on the ground of misdirection the Lord Chief Justice, in the course of argument, says: “Warren encouraged Harlow to remain and received rent from him.” As encouragement he is apparently referring to his joining with Harlow in refusing to give up possession, for there is no other fact mentioned in the report which could be regarded as encouragement. He says in conclusion: “If there had

been no evidence here but that the under-tenant remained in possession I should have left the case differently."

The fact is *Doe v. Harlow* settles no principle at all. The Court merely held that there was evidence on which a jury might properly find that Warren had made himself a party to the tort.

Their Lordships are of opinion in the present case that there is no such evidence, and on this point the appeal ought to be allowed. and the decree of the Subordinate Judge varied by striking out the words "and 3" (1) from the direction for payment of Rs.10,350 with proportionate costs and from the direction for payment of Rs.3900 with proportionate costs. The appeal substantially succeeds, inasmuch as the point as to the statute involves a comparatively small sum of money and can hardly have caused a material increase of costs.

In their Lordships' opinion, therefore, the appellant should have the costs of the appeal and proportionate costs both in the Subordinate Court and in the High Court attributable to the items on which he has succeeded. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Pugh & Co.*

Solicitors for respondents 2, 3 and 4: *Watkins & Hunter.*

(1) Referring to defendant 3 (the present appellant).

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 (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Hindu Law—Religious Endowment—Math including several Asthals—Division of Mahantship—Conflicting Wills of Mahant.

In 1908 the mahant of a math, which included a greater and five lesser asthals, executed a will appointing the first respondent his chief chela and to succeed him as gaddinishin mahant. In 1918 he executed two wills on the same day. By the first he named the first respondent to succeed him as mahant of one of the lesser asthals, and bequeathed to him the income thereof, also some land attached to another lesser asthal. By the second will, after stating the effect of the first, he bequeathed to another chela all the rest of the math property, and appointed him to succeed as gaddinishin mahant. The testator died shortly after. The two chelas then compromised disputes by giving effect to the two wills of 1918. In 1920 the new gaddinishin mahant died, having by his will appointed the appellant to succeed him. The first respondent sued to establish his right to be gaddinishin mahant and to possession of the whole property of the math. Both Courts rejected his claim to succeed as being senior chela, but the High Court held that the wills of 1918 were ultra vires, as an attempt to divide the asthals, and that he succeeded under the will of 1908:—

Held, that the wills of 1918 should be treated as separate documents, and that the appellant was entitled to be gaddinishin mahant under the definite appointment in the second will, whether or not the reservation of the lesser mahantship (which the appellant did not claim) was valid.

Sembler, that when the usage in a math consisting of several asthals has been to have only one mahant, a separation of the office is improper, unless there are special circumstances justifying it.

Decree of the High Court, I.L.R. 52 C. 748, reversed.

APPEAL (No. 134 of 1927) from a decree of the High Court (February 7, 1925) reversing a decree of the Subordinate Judge of Midnapur.

The suit was brought by the first respondent for a declaration that he was gaddinishin mahant of a math in the Midnapur district, and for possession of the properties

* Present: LORD PHILLIMORE, LORD ATKIN, LORD SALVESEN, and SIR LANCELOT SANDERSON.

appertaining to the math. The math included a greater asthal and five lesser, or subordinate, asthals. The plaintiff claimed as chief chela of a mahant who had died on August 27, 1918, and under an appointment contained in his will executed in 1908. The appellant, who was in possession as gaddinishin mahant, claimed that under two wills executed on August 2, 1918, by the mahant above referred to, he was gaddinishin mahant, and that the plaintiff was mahant of one of the lesser asthals only, and entitled only to the property thereto appertaining and certain property appertaining to another lesser asthal. The wills of 1918 did not in terms revoke the will of 1908.

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The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit.

The High Court reversed the decision and decreed the suit. The learned judges (Walmsley and Page JJ.) held that the wills of 1918 were inoperative according to Hindu law, since they purported to partition the math. The judgment is reported at I. L. R. 52 C. 748.

1928. Nov. 16, 19. *Dunne K.C.* and *Hyam* for the appellant.

De Gruyther K.C. and *Wallach* for the first respondent.

[Reference was made to *Mahant Ramanoor Doss v. Mahant Debraj Doss*(1); *Greedharee Doss v. Nundokissore Doss*(2); *Ram Parkash Das v. Anand Das*(3); *Sethuramaswamiar v. Meruswamiar*(4); *Adams v. Southerden*(5); *Mayne's Hindu Law*, paras. 439, 440.]

Dec. 17. The judgment of their Lordships was delivered by **LORD PHILLIMORE**. In the district of Midnapur there is a math or charitable endowment of ancient foundation, and this appeal concerns a dispute as to the title to the office and emoluments of the mahant of this math.

(1) (1839) 6 S.D.A. (Beng.) 262. (3) (1916) L.R. 43 I.A. 73.
(2) (1867) 11 Moo. I. A. 445. (4) (1917) L.R. 45 I.A. 1, 9.
(5) [1925] P. 177.

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Nothing is known of its earlier history. There is a deed of gift in the year 1841 to one Lachhman being then mahant. And he on September 11, 1878, appointed Bharat Das, his disciple, to be his successor in the office. The document is in the form of a letter attested by various witnesses and addressed to the appointee, and the appointment is per verba de presenti; but the document is described as a will and was registered as such, and the appointment was only to operate upon the death of the appointor. In this document Lachhman describes himself as the gaddinishin mahant of the well-known akhra named bara asthal, wherein two known idols, Raghunathjiu and Gopinathjiu and other idols have been installed from the time of his predecessors and to which certain other asthals described in the schedule, and also in his possession, are said to be subordinate, of all of which he is owner and manager. Five asthals or houses are mentioned in the schedule.

Lachhman died and was succeeded by Bharat, and Bharat in turn died on August 27, 1918. He had on February 24, 1908, executed an appointment of his successor. The document is in the same form as that by which he himself was appointed, and must be deemed to be a will. In it he describes himself as gaddinishin chela of the mahant Lachhman, and recites his own appointment, and makes Gobinda Ramanuj, the plaintiff in the present suit and a respondent in this appeal, chief chela and malik and gaddinishin mahant like himself. To this document a schedule is appended in the same form as the schedule to the previous document containing the names and descriptions of the five minor asthals.

Ten years later, in 1918, Bharat executed two new wills. Both are dated as at the same day, but internal evidence shows that they were not intended to be deemed simultaneous, and enables their Lordships to fix their sequence. The first was addressed to Ramanuj. It recites that Ramanuj is the object of his affection and his chela, but states that the appointor has also another disciple named Gobinda Das Rasuya, and that in the apprehension that in future there

may not be good feeling between the two chelas after the appointor's death, he is making a will according to the terms which follow. The will then proceeds to name Ramanuj as shebait paricharak mahant with the income of all the properties dedicated for the shebas of one of the minor asthals, and in addition with two bighas of land taken from one of the other asthals, and gives to him the ornaments of the idols of the bequeathed asthal and its other possessions, to be enjoyed after the appointor's death by Ramanuj his chelas and par-chelas in succession.

The will then proceeds to speak of the bara (or greater) asthal as being the original gaddi of the former mahant, and to require the appointee and his successors to pay one hundred rupees per year to this principal gaddi.

The will does not in terms say who is to be the mahant of the principal math, but it obviously contemplates the appointment of Rasuya, because it goes on to provide that if either of the two die before appointing a successor, the surviving mahant should take his place and become mahant of the whole.

The second will is in a similar form and is addressed to Rasuya. It recites that the appointor has the two chelas, and that he has executed a will to the effect that out of the properties which he owns and possesses as shebait he has made over the two bighas of land and the properties appertaining to the particular minor asthal to Ramanuj, and proceeds to bequeath all the rest of the property of which he is possessed to Rasuya, appointing him gaddinishin mahant like himself, nominating him malik of the asthal and providing that he should continue in possession down to his chelas and par-chelas in succession. The will further provides that Rasuya shall for the benefit of the shebaits of the principal idols receive the sum of one hundred rupees a year from the other mahant, who is described, as he is described in the other will, as the paricharak mahant of the particular idols appertaining to the minor asthal. The will concludes with a clause similar to that in the other will providing that in case either mahant dies without appointing a successor, the other mahant shall succeed.

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Shortly after executing these wills Bharat died, and disputes then arose between the two nominees.

An arrangement, however, was effected and embodied in two ekrarnamas executed on January 29, 1919, whereby the provisions of Bharat's two wills were recognized and each of the parties entered into possession of their respective offices, as conferred by the wills. Rasuya did not live long after this arrangement, and died on February 18, 1920, having by will of that date appointed the defendant, Ramcharan Das Rasuya, the present appellant, his successor.

Thereupon the plaintiff launched the present suit, making a claim to be the sole mahant, and supporting his claim by various allegations. First he said that as senior chela of Bharat he was entitled as of right to be his successor and could not be ousted by a will. Then he said that the two wills of 1918 were brought into existence by fraud and undue influence, and that Bharat had not at the time of their execution a sound disposing mind. Further, he contended that the will of 1908 was irrevocable. Next he said that the two appointments were ultra vires and illegal, and that the math consisting of the various asthals could not be divided, and that if these two wills were set aside the earlier will by which he had been appointed sole mahant prevailed, or that if there was an intestacy his title as senior chela prevailed; and finally he attacked the appointment of Rasuya on the ground that his alleged testator had died without making a will and therefore, even if the wills of 1918 stood, he, the plaintiff, was entitled to succeed under the clause of the will, which provided that in the event of either of the two mahants dying without appointing a successor, the other mahants should succeed. As to the compromise effected by the ekrarnamas, he said in substance that no compromise could affect the title to an office.

The Subordinate Judge decided all these points against the plaintiff and dismissed the suit. On appeal the learned judges agreed with the Subordinate Judge that the plaintiff could not claim the appointment as of right by reason of his being chief chela, and that the document of 1908 was a will

and was revocable. The allegation that the wills of 1918 were obtained by undue influence, and that Rasuya had died without making a will, do not appear to have been pressed before the High Court.

The High Court, however, decided in favour of the plaintiff on the following grounds. The Court held that the appointments in 1918 were ultra vires and illegal, and must be set aside. The judges treated the wills of 1918 as having revoked the will of 1908, but they treated it as a case of dependent, relative revocation, and thought that in accordance with this doctrine the will of 1908 prevailed. The judges were inclined also to think that if no will stood the plaintiff had a title to the succession as chief chela, and it is right to add that one of the learned judges, Page J., attached considerable importance to this title, and only agreed with some hesitation to the view held by his colleague and by the Subordinate Judge that this title could be displaced by a will. As to the compromise as expressed in the ekrarnamas, they held that no estoppel was effected thereby.

With regard to the defence, which is founded upon the ekrarnamas, the reasoning of the learned judges in the High Court is not easy to follow. When two parties enter into an agreement, whether it be of compromise or in some other respect, each procures the advantage of the agreement from the other, and no further advantage need be looked for to support the agreement. As far as the two parties to the agreement are concerned, each obtained for himself the benefit of an unquestioned title, and prevented himself from questioning the other's title to his respective office; and the present defendant as privy in estate with Bara Gobinda would appear to be equally entitled to take advantage of the agreement.

It might be, however, that owing to the form of this particular suit the agreement would not constitute a defence, because in form the suit is not brought by Gobinda Ramanuj, but by the two idols acting through him as their alleged shebait—an idol being a juridical entity in Indian law: see *Vidya Varuthi Thirtha v. Balusami Ayyar.* (1) If it were

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necessary to pursue this matter, it would be proper to inquire whether Ramanuj could by claiming to use the name of the idols as plaintiffs prejudge and preclude any issue which would bear upon the question of his title to be gaddinishin mahant. But in their Lordships' opinion the defendant can succeed upon other grounds.

If the wills of 1918 were inoperative their Lordships would agree with the learned judges in the High Court that the will of 1908 would stand. It would not be necessary in their Lordships' view to invoke the doctrine of dependent, relative revocation, because there is no revoking clause in the wills of 1918, and the will of 1908 would be only revoked by reason of, and to the extent of, its inconsistency with the later wills, and if the later wills effect nothing the older will must stand.

It becomes, therefore, a question whether the later wills were ultra vires and therefore ineffectual. The judges in the High Court treated the two wills as being equivalent to one document, and as purporting to divide a math which they stated would be illegal. They relied upon the authority of this Board in the case of *Sethuramaswamiar v. Meruswamiar*.⁽¹⁾ But neither this case nor the earlier one of *Jaafar Mohiudin Sahib v. Aji Mohiudin*⁽²⁾, to which their Lordships have referred, touch the present case. They were cases where the office of mahant or a similar office was hereditary, but the mahant being a member of an undivided Hindu family, the other members of the family claimed to share in the endowments and if necessary to have a partition; and what was determined was that the endowments went with the office and were to be enjoyed by the office-holder without partition between him and the members of his family. There is no direct authority as to the power of a mahant who has a number of separate asthals, which by usage have all been held by one man, to provide for their division between his successors, or to saddle the property of one or more of the component asthals with a reservation in favour of the others. All that can be safely said is that, as the essence of the law governing these maths lies in the following of custom

(1) L.R. 45 I.A. 1.

(2) (1864) 2 Mad.H.C. 19.

or usage (see the case in 48 I.A., already cited), *prima facie* such a separation would be improper, unless there were special circumstances justifying it. But their Lordships desire to be understood as expressing no determination upon this point, as in their view it is unnecessary. They look at the two wills as separate documents, and they find in one of them an effectual appointment of the defendant-appellant to be gaddinishin mahant, with some reservations added which may or may not be valid. The existence of these reservations and their appearance as a positive bequest in the other will does not detract from the definite appointment which, in their Lordships' view, was effectually made. The defendant-appellant was lawfully created gaddinishin mahant. He puts forward no claim to the minor mahantship, which was bequeathed to the plaintiff-respondent.

In their Lordships' opinion, the Subordinate Judge was right in his decision, and they will humbly advise His Majesty that this appeal should be allowed and that the suit should be dismissed with costs here and below.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondent No. 1: *Watkins & Hunter.*

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 Dec. 10. CHEE SWEE CHENG AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS
 SETTLEMENTS, SINGAPORE.

Evidence—Admissibility—Conveyance to Persons as joint Tenants—Parol Evidence to prove Severance—Evidence Ordinance (Straits Settlements Laws, 1926, No. 53), s. 92—Indian Evidence Act (I. of 1872), s. 92.

When property has been conveyed to persons as joint tenants there may be a severance of the joint tenancy by any course of dealing sufficient to intimate that the interests of all of them were mutually treated as constituting a tenancy in common.

Parol evidence to prove a severance is not excluded by s. 92 of the Evidence Ordinance of the Straits Settlements (which is in the same terms as s. 92 of the Indian Evidence Act, 1872), since the evidence does not contradict or vary the terms of the conveyance.

In the present case the Judicial Committee held that evidence relied on to establish a severance was insufficient for that purpose.

Williams v. Hensman (1861) 1 J. & H. 546, 557 followed.

Judgment of the Supreme Court reversed.

APPEAL (No. 133 of 1927) from a judgment of the Supreme Court of the Straits Settlements, in Appeal (September 20, 1926), reversing a judgment of Murison C.J.

The question for determination in the litigation was whether certain property in the Straits Settlements had been held by four persons as joint tenants, as the appellant contended, or as tenants in common, as the respondents contended.

The property had been conveyed to the four persons by a conveyance of June 28, 1892, in terms which both Courts in the Straits Settlements held constituted them joint tenants; a majority of the Court of Appeal (reversing Murison C.J.) held that there had been a subsequent severance whereby they became tenants in common.

The facts, and the views of the learned judges, appear from the judgment of the Judicial Committee.

* Present: VISCOUNT SUMNER, LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

1928. Nov. 12, 13. *G. B. Hurst K.C.* and *Langley* for the J. C.
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Gavin Simonds K.C. and *Greenland* for the respondents.

[Reference was made to *Williams v. Hensman* (1); *In re Wilks* (2); *In re Jackson* (3); also to the Evidence Ordinance (Straits Settlements Laws, 1926, No. 53), s. 92, and Conveyancing the Law of Property Ordinance (Straits Settlements Laws, 1926, No. 36), s. 52.]

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Dec. 10. The judgment of their Lordships was delivered by **LORD WARRINGTON OF CLYFFE**. The appellant, as the executrix of Eng, the last survivor of four persons, Hoon, Lim, Quee and Eng himself, claims to be entitled to certain property on the grounds that such property was conveyed to them as joint tenants and that the jointure has not been severed.

The respondents, the executors of Hoon, Lim and Quee respectively, claim that Hoon, Lim, Quee and Eng himself were entitled to the property in equal shares as tenants in common, either because, as they contended in the Courts below, they were originally tenants in common, or because they all pursued a course of conduct from which an agreement should be inferred on the part of them all to sever the jointure.

In the Courts of the Colony there was a remarkable difference of judicial opinion. Murison C.J., before whom the action was tried, decided in favour of the appellant. In the Court of Appeal Brown J. agreed with the Chief Justice, but the majority (Deane and McCabe Reay JJ.) took the opposite view, though for different reasons, and judgment was accordingly entered for the respondents. Hence this appeal.

The three persons shortly referred to as Hoon, Lim and Quee were brothers, and Eng was their nephew, being the son of another brother. Under the will of their father Yam (hereinafter referred to as the testator), who died in the year 1862, his four sons, Hoon, Lim, Quee and Peck, became

(1) (1861) 1 J. & H. 546.

(2) [1891] 3 Ch. 59.

(3) (1887) 34 Ch.D. 212.

J. C. entitled to shares in his residuary estate. His estate was
 1928 administered under a decree of the Court in an administration
 TAN CHEW action. Peck had mortgaged his share. In 1891 it was sold
 HOE NEO by the mortgagee, and was subsequently bought from the
 CHEE SWEE purchaser by the four persons abovenamed.

CHENG. By an indenture dated June 28, 1892, in consideration
 of \$18,000 stated to have been paid by the purchasers out
 of money belonging to them on a joint account, the share
 of Peck was conveyed to Hoon, Lim, Quee and Eng as joint
 tenants absolutely. Each of the purchasers was in the deed
 described as a "merchant." The purchase money was raised
 by a mortgage of the purchased share and of certain other
 shares in the original testator's estate, which mortgage is
 dated June 29th, 1892.

It was assumed on both sides in the argument before this
 Board that the principles of law applicable to joint tenancy,
 and the means whereby a severance of the jointure may be
 effected, are the same in this country and in the Colony,
 except only that the appellant contended that under
 s. 92 of Ordinance No. 53 parol evidence leading to
 an inference of an agreement to sever the jointure is not
 admissible.

The effect of the conveyance of June 28, 1892, is, in their
 Lordships' opinion, beyond dispute. It created in terms a
 joint tenancy between the four purchasers. In fact, this was
 tacitly conceded by counsel in the argument before this
 Board. It is true that one of the judges in the Court of
 Appeal was of opinion that the maxim, "Inter mercatores jus
 accrescendi locum non habet," applied to the case, and accord-
 ingly held that the tenancy created by the deed was a tenancy
 in common. This view was not supported before this Board,
 and in their Lordships' opinion could not successfully be
 supported. The purchasers are, indeed, described in the
 deed as "merchants," but there is no evidence at all that the
 purchase was in any way connected with their trade or indeed
 that they were jointly concerned in any trade.

The tenancy then was originally a joint tenancy. The
 remaining question is, has the jointure been severed

and the joint tenancy converted into a tenancy in common? J. C.
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The law on this subject is stated as follows by Wood V.-C. in *Williams v. Hensman* (1): "A joint tenancy may be severed in three ways: In the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share..... Secondly, a joint tenancy may be severed by mutual agreement. And in the third place there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other parties interested. You must find, in this class of cases, a course of dealing by which the shares of all the parties to the contest have been affected."

Their Lordships accept this as an accurate statement of the law.

In this country such a course of dealing may be proved in the same way as any other relevant fact may be proved. But it has been contended, and the contention was accepted by some of the judges in the Colony, that under s. 92 of the Ordinance 53 (Evidence) parol evidence is not admissible to prove the fact in question. As will be seen hereafter, it is in strictness unnecessary to decide this point, but having regard to the difference of judicial opinion in the Courts below, their Lordships think it right to express their view on the subject.

Sect. 92 is as follows: "When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms."

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The section is subject to provisos. Proviso 4 (1) has been referred to, but in their Lordships' opinion has no bearing on the present question, inasmuch as in their view the section itself does not apply.

In the present case evidence is tendered, not for the purpose of contradicting or varying the terms of the conveyance, but of proving facts from which it may be inferred that, accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy in common.

It remains then to determine whether on the whole of the evidence as tendered the respondents have established facts from which an agreement to sever should be inferred. On this point it is necessary to state a few facts and dates:—

On January 26, 1894, by a deed of that date the property comprised in the mortgage of June 29, 1892, was reconveyed by the mortgagee discharged from the mortgage. Nothing turns upon the terms of this deed.

In the year 1895, in pursuance of a liberty reserved in the decree for the administration of the estate of the original testator, certain members of the family carried in proposals for the purchase by them of certain items of the testator's estate, the purchase money or part of it being provided out of their respective shares in the estate.

Among these proposals was one on behalf of Hoon, Lim, Quee and Eng to purchase five houses as tenants in common for \$4600. These houses were on June 3, 1895, conveyed to the four persons as tenants in common in equal shares, the conveyance reciting the deed of June 28, 1892, with its limitation to them as joint tenants.

One of the witnesses, Swee, says that when they were going to partition the testator's property, by which expression he obviously refers to the transaction just mentioned, he first

(1) Proviso 4: "The existence of or disposition of property is by law any distinct subsequent oral agree- to be in writing, or has been regis- ment to rescind or modify any such tered according to the law in force contract, grant, or disposition of for the time being as to the regis- property, may be proved except in tration of documents."

cases in which such contract, grant,

heard that the words "joint tenancy" were in the deed of 1892, and that on their effect being explained to him by the solicitors he was surprised, and called a meeting of the four persons concerned, and that they told him to go to the solicitors and get the proposals for sale of the property altered. "Instead of joint tenancy, I was to get them put on the basis of a tenancy in common." As mentioned above the proposal for the purchase of the five houses and the conveyance thereof to the purchasers were "put on the basis" of a tenancy in common—namely, the houses were so conveyed, the instructions deposed to being confined to the particular case. Their Lordships cannot find so far anything from which a general intention or agreement to sever can be inferred.

The next event was the death of Hoon on September 28, 1903.

In 1905 Hoon's executors and the remaining three persons interested in the shares in question were desirous of creating a trust of the share in favour of Peck and his children, if any. This was carried into effect by a deed poll dated May 1, 1905, to which Hoon's executors were parties and concurred in the declaration. It took the form of a covenant by them all that they and the survivor of them would stand seised and possessed of the property assigned to them by the deed of June 28, 1892, upon certain trusts. It is said that Hoon's executors had no interest in this property except on the footing of a tenancy in common, and that the form of the deed therefore supports the theory of a severance. But this ignores the fact that the houses purchased in 1895 represented a part of the share assigned by the deed of 1892, and the concurrence of Hoon's executors was necessary in regard to these houses. In this deed also the limitation to the four as joint tenants is referred to and no suggestion of a severance is made.

On November 24, 1906, Quee died, and on December 18, 1907, Lim died, Eng becoming thus the survivor of the four joint tenants.

By a deed poll dated October 19, 1908, new trustees of the deed of 1905 were appointed, and by this it is made clear

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J. C. that the three houses remaining unsold of the five purchased
 1928 in 1895 were included in the trust.

TAN CHEW Their Lordships can see nothing in these last mentioned
 HOE NEO transactions from which a severance can be inferred.
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CHENG. The remainder of the evidence consists of certain statements
 made by individual members of the quartette, including
 Eng, which it is said indicate that they respectively thought
 that there was no right of survivorship, together with certain
 accounts which it is said prove a division of income after the
 deaths of those who died before Eng. Their Lordships
 cannot accept the evidence afforded by these statements and
 accounts as sufficient of themselves to justify an inference
 of an agreement to sever.

The result is that, in the opinion of their Lordships, this appeal ought to be allowed, the order on appeal reversed, and that of Murison C.J., restored with costs to be paid by the respondents. The costs in the Court of Appeal were made payable out of Peck's share in the testators' estate, and their Lordships see no reason for interfering with that order. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Peacock & Goddard.*

Solicitors for respondents: *Nisbet, Drew, & Loughborough.*

GOPIKA RAMAN ROY (PLAINTIFF)	APPELLANT;	J. C.*
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ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Evidence—Documents not produced at first Hearing—Discretion of Court to admit Documents—Official Records which may assist Court—Relation of Landlord and Tenant—Construction of Decree—"Jotedar"—Code of Civil Procedure (Act V. of 1908), Order XIII., rr. 1, 2.

Where a party has not produced at the first hearing, as required by Order XIII., r.1, the documents in his possession or power on which he relies, the leave of the Court under r.2 admitting them at a later stage should not ordinarily be refused if the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

In a suit of 1854 a zamindar obtained a decree for possession, with mesne profits, of lands forming part of his estate; the decree ordered that "as long as the defendants are ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their rights as jotedars." The defendants and their successors remained in possession without paying rent:—

Held, that the decree did not constitute the relation of landlord and tenant between the zamindar and the then defendants (predecessors of the present parties), but merely entitled them to the rights of jotedars (whatever those rights may have been at the date of the decree) if they were ready and willing to pay rent.

The further circumstances of the present case (even after admitting evidence excluded in India under Order XIII.) not establishing the relation of landlord and tenants between the present parties, the Indian Limitation Act, 1908, Sch.I., art.139, did not apply, and the appellant's suit was barred by art. 144.

Decree of the High Court affirmed.

APPEAL (No. 81 of 1926) from a decree of the High Court (April 17, 1924) affirming a decree of the first Subordinate Judge of Sylhet.

The suit was brought by the appellant against numerous defendants, the present respondents, claiming possession of plots of land forming part of a zamindari estate. The appellant's claim was based on the purchase of a one-seventh share in the estate in 1896; he alleged that the lands in suit had been allotted to him in respect of that share; that the

* Present: LORD SHAW, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

J. C. defendants were his tenants and that their tenancies had been determined by notices less than three years from the date of suit.

1929 *RAMAN ROY v. ATAL SINGH.* Both Courts in India held that the relation of landlord and tenant did not exist between the appellant, or his predecessors, and the respondents, or their predecessors; that art. 139 of the Indian Limitation Act, 1908, consequently did not apply, and that the suit was barred by art. 144.

Before closing his case at the hearing the plaintiff sought to put in evidence certain documents, including copies of the judgments in suits brought in 1854 by the then zamindars. These documents had not previously been produced or referred to. The Subordinate Judge refused to give leave under Order XIII., r. 2, admitting them in evidence, and that decision was affirmed on appeal.

1928. Dec. 6, 7, 10. *Gavin Simonds K.C. and S. Hyam* for the appellant.

De Gruyther K. C. and Parikh for the respondents.

1929. Jan. 22. The judgment of their Lordships was delivered by

SIR JOHN WALLIS. This is an appeal from a decree of the High Court at Calcutta affirming a decree of the First Subordinate Judge at Sylhet and dismissing the plaintiff's suit, which both Courts held to be barred by limitation.

The plaintiff sued as the owner of a one-seventh share of the permanently settled estate No. 85 of the Collectorate of Sylhet to eject defendants 1 to 160 from 143 holdings in the occupation at the date of the plaint of defendants 1 to 160, as shown in the first schedule to the plaint. Defendant 161 was joined as a purchaser from defendant 148, defendants 162 to 186 as the co-sharers with the plaintiff in the estate, and defendant 187 as vendor to the plaintiff's father in 1896.

The plaint alleged that by an amicable arrangement the lands in schedule I had been allotted to a predecessor of the plaintiff in respect of a one-seventh share, which was afterwards acquired by the plaintiff's father in 1896, that they

had all along been in the occupation of the defendants 1 to 160 as tenants, that in 1896 these defendants had rendered themselves liable to forfeiture by denying their landlord's title, that the plaintiff's father had enforced their forfeiture and determined the tenancies by instituting 120 suits in 1904, which were afterwards withdrawn by leave with liberty to bring a fresh suit, and that the present suit was within time because brought within twelve years of the determination of the tenancies by the institution of the aforesaid suits. There was also a plea that the suit was not barred, because the plaintiff was entitled under s. 14 of the Limitation Act to exclude the time spent in prosecuting the former suits, but this has not been relied on before their Lordships.

Defendants 1 to 160 pleaded, in addition to other defences, that they were not and never had been the tenants of the plaintiff and his predecessors in title, and both the lower Courts, after a very careful examination of the evidence, have found that the plaintiff has failed to prove the alleged tenancies and so to bring the case within art. 139 of the Indian Limitation Act.

This was the only question argued on this appeal, and their Lordships, after carefully considering the evidence before the lower Courts, and the additional evidence which they thought it right to admit in the circumstances hereinafter stated, have arrived at the same conclusion.

The case is a very unusual one, because both the lower Courts have found that the plaintiff has failed to prove any payment of rent to the plaintiff or his predecessors in title in respect of these lands ever since they began to be reclaimed and brought under cultivation about a hundred years ago. In these circumstances the learned counsel for the appellant has been obliged to rely mainly on the effect of a decree in a suit of 1854, which, as found in the plaintiff's favour, was between his predecessors in title and the predecessors of defendants 1 to 160.

It is common ground that the suit lands were dense jungle until, in 1828 or later, some of the defendants' predecessors

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J. C. began to cultivate them. In 1844 the revenue authorities, 1929 treating them as ilam or unsettled lands which were at the disposal of Government not having been included in any ^{GOPIKA} RAMAN ROY permanently settled estate, assessed them to revenue; and ^{v.} ATAL SINGH. it was only after a long struggle that the plaintiff's predecessors succeeded in getting the revenue authorities in 1852 to reverse this decision and to recognize that these lands formed part of their permanently settled estate No. 85 in the Collectorate of Sylhet.

It is also clear that the contesting defendants' predecessors preferred the position of raiyats holding directly under Government and were very unwilling to be included in the plaintiff's zamindari, and it was in these circumstances that the plaintiff's predecessors on March 24, 1854, instituted suit No. 9 of 1854 in the Court of the principal Sudder Amin of Sylhet against these defendants' predecessor for possession and mesne profits,

According to the allegations in the plaint, Pesal Chandra Rajkoer and other Manipuries, immigrants from the neighbouring state of Manipur, had executed kabuliats in favour of the husbands of two of the plaintiffs, who were widows, and had gone on paying rent to them until Shyan Sing, one of the defendants, and others had presented petitions alleging that these lands were ilam and not included in the plaintiff's zamindari.

It may be observed here that, if the plaintiffs had been in a position to prove these allegations, they might have framed their suit against the defendants to enforce their rights as landlords on the footing of a subsisting tenancy, but it is equally clear from the terms of this plaint that they did not do so.

After setting out that the revenue authorities had assessed the suit lands as ilam and had afterwards reversed their decision and paid over to the plaintiff the assessments they had collected, the plaint proceeded to state the cause of action against the defendants as follows: "The settlement holder (s) and jotedar defendants having been raiyats and jotedars of the disputed settled and unsettled lands, they

are in joint possession of the disputed lands as such," the defendants were referred to in this way because the revenue authorities had only effected settlements with some of the defendants, "After the disputed land was found, upon re-trial by the Sadar Board, to be revenue-paying land as appertaining to the said taluq belonging to us and was released from assumption as unsettled class of land, we on 1st Jaistha, 1259 (June, 1852), asked the defendants to give up possession of the disputed land, but instead of doing so the principal defendants are in possession of it as ijmal (joint.) Accordingly we and the co-sharer defendants are entitled to get possession." The plaint then concluded with a claim for past and future mesne profits, which it is unnecessary to set out.

In their Lordships' opinion this plaint is quite inconsistent with the view that there was any subsisting relation of landlord and tenant between the plaintiffs and the defendants in that suit.

It is equally clear from the summary of the written statements in the judgment that the defendants repudiated any tenancy under the plaintiffs. Their case was that they had been "living on the land in dispute from 1255 B.S. (1828) and possessing the Government unsettled lands by bringing under cultivation the jungles."

It remains then to be seen whether the effect of the judgment was to establish a relation of landlord and tenant which was not the case of either side.

Some reliance has been placed on the finding on one of the preliminary issues that the defendants as jotedars, according to the ruling of the Court of Sudder Adalat, could not plead limitation against the maliks as owners. In their Lordships' opinion, this ruling, the grounds of which are not given, falls far short of affirming the existence of a subsisting tenancy.

The Court then recorded its finding on the "issues regarding the facts affecting the claim," which were as follows: "Whether the disputed land belongs to the plaintiffs in purchased zamindari right as appertaining to taluk No. 85, Mahamad Jalal, within mauza Patharkandi, and whether

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J. C. upon proper enquiries the said land was found to appertain to the said taluk, and was thereupon released by Government officers in favour of some of the plaintiffs, and whether the rent received from the jotedar defendants was paid back to the plaintiffs, and whether the objection made by the defendants that the said lands are ilam lands, though they were released by the Sadar Board on behalf of the Government is admissible? And whether the plaintiffs are entitled to the mesne profits they have claimed?"

On this issue the Court held that it could not go behind the decisions of the revenue authorities that the suit land was not ilam land, and that it formed part of estate No. 85. It accordingly proceeded to give the plaintiffs a decree for possession and mesne profits at specified rates: "Therefore for the above reasons it is ordered that the suit be decreed in favour of the plaintiffs awarding Rs.1,235-6-10 pies as mesne profits for the disputed lands in the plaintiffs' share for the years 1258 B.S. to 1260 B.S. at the rates mentioned above and costs in proportion to the claim together with mesne profits at the said rates from 1261 B.S. till recovery of possession and awarding them possession of the disputed land as per boundaries given in the plaint as zamindars; that as long as the defendants are ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their right as jotedars, that the defendants do pay to the plaintiffs the mesne profits due to them and the costs to the extent of the claim as well as costs in Court."

Their Lordships agree with the lower Courts that the latter part of this order cannot be read as establishing the relation of landlord and tenant between the parties, which, as already observed, neither side had set up, but is to be read as giving the plaintiff a decree for possession with past and future mesne profits, subject to this condition that, so long as the defendants were willing to pay rent at the specified rates to the plaintiffs, they should not be ousted from their rights as jotedars.

"Jotedar," according to Wilson's Glossary, means cultivator, and it may well be that in those days, before the enactment

of the Bengal Rent Act, 1859, the view was entertained that, by bringing these waste lands into cultivation, the defendants had acquired a right of occupancy of which they ought not to be deprived even though they had not set it up in their pleadings. But, whatever the right of the jotedar may have been in those days, it seems clear that under the decree the defendants were only to be entitled to it if they were ready and willing to pay rent to the zamindar, and there is abundant evidence in this case that they were not so willing, but entirely disregarded the decree.

The plaintiff also relied on a certified copy of an award of the Deputy Collector of Sylhet in certain boundary cases under Reg. VII. of 1822. The plaintiffs in those cases were the predecessors of the plaintiff, and one case related to the alleged inclusion of 5636 bighas of estate No. 85 in other mauzas. The defendants' names are given as Ramanand Singh Mohan Singh and Nunai Singh, who are not shown to have been the predecessors of defendants 1 to 160 or any of them. The plaintiff relies on certain statements of the Deputy Collector in his award in this case as to rent having been realized by the plaintiffs in suit No. 9 of 1854 from the defendants in that suit.

In their Lordships' opinion these statements are not admissible as evidence of rents having been realized from the defendants in that suit. The Indian Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Their Lordships also agree with the Courts below that this evidence, even if admissible, would be of very little weight.

Their Lordships have next to deal with the fresh evidence which they decided to admit in the following circumstances.

On August 20, 1918, the plaintiff, before closing his case, called as his thirty-second witness one Gopesh Charan Chowdury, 165th defendant, who was impleaded as one of his co-sharers. The witness produced certain documents which the Subordinate Judge would not allow to be filed at that stage. Thereupon the plaintiff on August 22, 1918, presented a petition praying for the admission of these

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J. C. documents, supported by an affidavit in which it was stated
 1929 that the plaintiff's law adviser only saw them for the first
 time on Sunday, August 18.

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RAMAN ROY *v.* ATAL SINGH. The Subordinate Judge did not accept this statement as the last mentioned witness had stated that the law agent had come to his house about two years ago—that is, in 1916—to see what documents he had, and the witness had showed him all the documents. In his order of August 22 the Subordinate Judge observed that the suit had been filed on October 7, 1912, and that after certain adjournments issues were settled on July 8, 1913, when the parties were directed to put in their documents within seven days. In these circumstances the Subordinate Judge apparently considered that they were out of time, and he refused to exercise his discretion in the plaintiff's favour, although the documents were certified copies of public records, because in his view it would have been prejudicial to the defendants to admit them at this late stage, and this order was upheld by the Appellate Court.

Now, in addition to enabling the parties to a suit to apply for discovery of documents, a matter regulated by Order XI., the Code of Civil Procedure imposes certain obligations on parties to a suit with reference to the documents on which they rely. Under Order VII. the plaintiff must file with the plaint the documents on which he sues and also a list of the documents on which he relies, and under r. 18 documents which ought to have been and have not been included in the list cannot be exhibited without the leave of the Court. Further, under Order XIII. the parties at the first hearing must produce the documents in their possession or power on which they rely, and under r. 2 no document "which should have been but has not been produced in accordance with the requirement of this rule" is to be admitted in evidence without the leave of the Court. It is apparently under this rule that the Subordinate Judge acted, as he observes that, on July 8, 1913, at the settlement of issues, which is at the first hearing, the parties were ordered to put in their documents within seven days.

This rule of exclusion, however, only comes into operation when the documents on which the parties rely should have been, but were not, produced at the first hearing. Now, according to the evidence at the date of the first hearing, these documents were not in the possession or power of the plaintiff, and the plaintiff and his advisers did not know of their existence so as to enable them to inspect them and form an opinion as to whether they would rely on them or not. In these circumstances it cannot be said that they should have been produced at the first hearing and therefore the rule does not authorize the exclusion. Further, as has been held in India, even where the rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

Their Lordships accordingly admitted the excluded documents, but find on examining them that they do not assist the plaintiff. Documents 2 and 3, which are copies of the measurement chitta prepared by the amin in connection with the execution of the decree in suit No. 9 of 1854, and the amin's report, only show that the amin had great difficulty in executing the decree by putting the plaintiffs in possession owing to the absence of the defendants, and do not show, as contended for the plaintiff, that he gave them only symbolical possession instead of vacant possession.

Documents Nos. 4 to 11 are judgments of the Collector of Sylhet in suits filed by the plaintiffs in suit 9 of 1854 against defendants alleged to be in possession of eight holdings for the execution of kabuliats. The judgments directed the defendants to execute kabuliats in respect of their holdings, but these holdings have not been identified with any of the 143 holdings which are the subject of the present suit; nor have the defendants in these suits been shown to be the predecessors in title of any of the defendants 1 to 160 in the present suit. It is not proved that decrees for the execution of kabuliats

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J. C. were obtained against any of the predecessors of defendants 1 to 160.

1929 *GOPIKA RAMAN ROY v. ATAL SINGH.* Sect. 88 of the Bengal Rent Act of 1859 no doubt provides that where a decree has been passed for the execution of a kabuliat and the defendant refuses to execute it, the decree is to have the same effect as if the kabuliat had been executed, and in this way a tenancy might be proved; but in the present case it is not shown that decrees for the execution of kabuliats were obtained against the predecessors of defendants 1 to 160 or that they refused to execute them.

For these reasons, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Stanley Johnson & Allen.*

J. C. * RAMDUTT RAMKISSENDASS . . . APPELLANTS;
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Jan. 29. F. D. SASSOON AND COMPANY . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Arbitration-Limitation-Arbitration after invalid Award-Indian Limitation Act (IX. of 1908), s. 14; Sch. I., art. 115.

In a reference to arbitration it is an implied term of the contract that the arbitrators must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law, including limitation, can be raised unless that defence has been excluded by agreement of the parties.

In applying to an arbitration the Indian Limitation Act, 1908, Sch. L, art. 115, which limits the time for commencing "a suit" for compensation for breach of contract, effect should be given by analogy to s. 14 of that Act, so as to exclude the time occupied by the plaintiff, acting bona fide and with diligence, in obtaining a previous award on the same cause of action, and in resisting a suit which, after an appeal to the Privy Council, resulted in the award being set aside for want of jurisdiction in the arbitrator.

In re Astley and Tyldesley Coal and Salt Co. (1899) 68 L.J.(Q.B.) 252 approved.

Order of the High Court affirmed.

* Present: LORD ATKIN, LORD SALVESEN, and SIR JOHN WALLIS.

APPEAL (No. 107 of 1927) from an order of the High Court in its appellate jurisdiction (November 8, 1926) affirming an order of that Court in its original jurisdiction (April 19, 1926).

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The appeal arose out of an award of arbitrators appointed in 1922 whereby the respondents were awarded damages for the defective quality of jute delivered by the appellants under contracts of sale made in 1913 and 1914; the award was subject to the opinion of the Court on the questions (1.) whether the defence of limitation could be raised, and if so (2.) whether the buyer's (respondents') claim was barred.

The facts appear from the judgment of the Judicial Committee.

The opinion of the Court delivered by Sanderson C. J. and Rankin was that the defence of limitation could be raised but that the claim was not barred.

That judgment not being open to appeal the appellants petitioned that the award (to which the opinion of the Court had been directed to be added) should be set aside on the ground that there was an error upon its face. The petition was dismissed by Buckland J. and that decision was affirmed on appeal by Rankin C. J. and Ghose J.

1928. Nov. 13, 15. *De Gruyther K. C.* and *W. Wallach* for the appellant. The respondents' claim was barred by limitation. The High Court rightly held that the defence of limitation could be raised: *In re Astley and Tyldesley Coal and Salt Co.* (1); and *Russell on Arbitration*, 11th ed., p. 394. In *Board of Trade v. Cayzer Irvine & Co.* (2) in the House of Lords the above decision was referred to with approval by Viscount Cave L. C. The claim was therefore barred by the Indian Limitation Act, 1908, Sch. I., art. 115. The view of the Appellate Court that the arbitration of 1922 was a continuation of that commenced in 1915 was erroneous. When the first award was made the proceedings of 1915 ended; the arbitrator became *functus officio*. The terms of s. 14 makes it impossible to apply that section to the period between

(1) (1899) 68 L. J. (Q.B.) 252.

(2) [1927] A. C. 610, 614.

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1917 and 1922 occupied by the appellant's suit to set aside the earlier award. During that period the respondents were not even by analogy "prosecuting" a civil proceeding. If the respondents had brought a suit in 1922, s. 14 clearly would not have applied.

Dunne K.C. and *S. Hyam* for the respondents. The principle of *In re Astley and Tyldesley Coal and Salt Co.* (1) does not apply to this case. In England procedure by arbitration in mercantile matters was established after the Statute of Limitations. In India it was established before the Indian Limitation Act, 1908, and the Indian Arbitration Act, 1899. Yet the Indian legislature expressly refrained from prescribing any period of limitation for arbitration proceedings. If, however, the defence of limitation could be raised in the present case, the claim was not barred. The High Court rightly held that the arbitration was a continuous proceeding commenced in 1915. Further, it would be inequitable to apply the provisions of Sch. I. of the Limitation Act without applying by analogy s. 14. Upon the facts of this case, and so applying s. 14, the claim was not barred. In any case it is submitted that the proceedings being under the Indian Arbitration Act, not under the Code of Civil Procedure, the present appeal does not lie.

De Gruyther K.C. in reply. The arbitration in *Champsey Bhara & Co.'s* case (2) was under the Indian Arbitration Act, but it was not suggested that the appeal did not lie. It is conceded that the language of ss. 13, 19 and 20 of the Limitation Act makes it possible to apply them by analogy to an arbitration, but that is not so in the case of s. 14.

1929. Jan. 24. The judgment of their Lordships was delivered by

LORD SALVESEN. This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated November 8, 1926, which on appeal confirmed an order passed by the said High Court in its original jurisdiction on April 19, 1926, and dismissed the appellants' application to have an award set aside and taken off the file.

The material facts which are not in dispute have been so fully set forth in the judgment now under review that the barest summary is all that is required to raise the two questions of law on which their Lordships have to decide. Under various contracts between September 16, 1913, and March 2, 1914, the appellants sold to the respondents certain quantities of jute. The contracts were all in a form approved by the Calcutta Baled Jute Trade Association and contained an arbitration clause such as is usual in mercantile contracts at the present day. The reference is in the widest form and submits to arbitration "any disputes arising out of or in any way relating to this contract or to its construction or fulfilment between the parties hereto and whether arising before or after the date of expiration of this contract." The clause also imports the rules and by-laws of the Association which provide machinery for carrying out the reference in the event of one of the parties failing to appoint an arbitrator within forty-eight hours after having been called upon to do so.

As the respective deliveries of jute sold under the contracts were made questions arose as to the quality of the goods supplied by the appellants and the respondents had to submit to large deductions in respect of alleged inferiority of quality. The cause of action arose at different times, but it is not material to consider the exact dates as the respondents showed due diligence in making their claims, for these were formulated in July, 1915, when a demand for compensation for breach of contract was made on the appellants, who refused to consider same.

On July 15, 1915, the respondents appointed an arbitrator to act on their behalf and called upon the appellants to appoint an arbitrator on their behalf, which after some delay they did in December, 1915. The appellants were, however, obviously not anxious that the arbitration should be proceeded with, and they endeavoured to obtain delay in every way that was open to them. Their arbitrator, Babu Gossain, refused to meet with the respondents' arbitrator, Mr. Allen, and ultimately Mr. Allen retired from the reference on March 7, 1916, and Mr. Singleton was appointed as arbitrator

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on behalf of the respondents in his place. The latter was equally unsuccessful in his efforts to get Babu Gossain to meet him, and after many excuses the latter on July 30, 1916, withdrew from the matter.

On July 27, 1916, the respondents wrote to the appellants a letter, referring to the retirement of Babu Gossain, and adding "we therefore call upon you to appoint an arbitrator to act on your behalf in the place of Babu Gossain within forty-eight hours, failing which we shall apply to the Baled Jute Association to make an appointment on your behalf in accordance with by-law 15 of the Association." To this letter the appellants replied on July 31 as follows: "The time limit under the Indian Arbitration Act is over, and we regret that we cannot agree to further extension of time. Regarding your suggestion that you will ask the chairman of the Association to appoint an arbitrator, we beg to point out that the chairman has no authority to override the provision of the Indian Arbitration Act. Further, we hold that the dispute to settle which this arbitration was agreed upon does not come under the terms of the Allied Baled Jute Association contract so the chairman cannot exercise his right under the contract."

To this letter the respondents replied rejecting the contentions of the appellants and calling upon them to appoint an arbitrator to act on their behalf within seven clear days from the date of their letter, in default of which they stated that they would appoint their own arbitrator as sole arbitrator in the reference in accordance with the provisions of the Indian Arbitration Act, 1899, s. 9 (b). As the appellants made no further appointment, the respondents appointed Mr. Singleton to act as sole arbitrator, which he accordingly did, and in the end made an award of Rs.68,574. His award, which was dated September 28, 1916, was duly filed and a warrant was issued directing the sheriff to levy the amounts awarded by seizure of the appellants' goods, and this was done.

The appellants thereafter, on January 8, 1917, brought a suit for a declaration that Mr. Singleton's awards were void

and inoperative on the ground that his appointment as sole arbitrator was illegal.

On April 7, 1920, the judge of the first instance upheld the award, but on appeal to the High Court at Fort William this judgment was reversed and an appeal taken by the present respondents to the Privy Council was dismissed. (1)

These proceedings occupied a considerable time. It was not until December 13, 1920, that the decision of the High Court was pronounced and the decision of the Judicial Committee of the Privy Council was only issued on July 20, 1922. Taking either of these dates, much more than three years had elapsed from the date when the cause of action had arisen.

On December 13, 1922, the respondents again demanded from the appellants the amount which they claimed under the eleven contracts and on December 28 appointed Mr. W. G. Dredge as arbitrator. The appellants declined to appoint an arbitrator on the grounds that the alleged claims were barred by limitation. On March 16 the chairman of the Baled Jute Association nominated Mr. D. S. Henderson to act as arbitrator with Mr. Dredge. The appellants thereupon on April 10, 1923, applied to the High Court for an order reviewing the various submissions to arbitration. After sundry procedure a consent order was made on August 15, 1923, that the matter in dispute be referred to the arbitration of the two arbitrators appointed to "deal with the matter and to make their award in the said reference and at the same time to state a special case for the opinion of this Court [the High Court] on the legal question of whether the defence of limitation can be raised in these matters and if so whether the claim is barred."

The arbitrators having awarded a sum of Rs. 98,258-11-3 stated a case in accordance with the High Court's order. This was decided on March 3, 1926. The High Court held that the arbitration proceedings had been in fact instituted on July 15, 1915, and therefore within the period of three years prescribed by the Indian Limitation Act. It is, in effect, from that order that the appeal has now been brought.

(1) (1922) L.R. 49 I. A. 366.

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J. C. The first question of law which arises is the important
 1929 general one, whether the Indian Limitation Act, 1908, applies
 to arbitration proceedings. The relevant section of that
 RAMDUTT Act is s. 3—"Subject to the provisions contained in ss. 4
 RAMKISSEN- to 25 inclusive, every suit instituted, appeal preferred and
 DASS application made after the period of limitation prescribed
 v. therefor by the first schedule shall be dismissed, although
 F. D. limitation has not been set up as a defence."

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Their Lordships will consider subsequently what effect, if any, is to be given to ss. 4 to 25, but it is admitted that art. 115 of the first schedule is that which applies to the subject-matter of the present suit. It is expressed as follows: "For compensation for the breach of any contract expressed or implied not in writing registered and not herein specially provided for," and the period of limitation is three years.

It will be observed that s. 3 has in view primarily suits, appeals and applications made in the law courts and makes no reference to arbitration proceedings. Their Lordships were not referred to any case decided in India as to whether this clause can be extended by analogy to arbitration proceedings, but similar language is employed in the English Statute of Limitations, and the question has been considered and decided in one case in England. This is *In re Astley and Tyldesley Coal and Salt Co.* (1) In that case it was held by the Divisional Court consisting of Bruce and Ridley JJ. that "a submission to arbitration does not per se exclude the right of either party to raise the defence of the Statute of Limitations, but if it be intended to exclude such a defence an express term to that effect must be imported into the agreement of submission." In his judgment Bruce J. said: "There is nothing in the submission to take away the right of the Tyldesley Coal Co. to raise any defence in relation to their liability to damages. It seems to me unreasonable that parties to a submission should be precluded from raising the defence of the Statute of Limitation unless a provision to that effect be drawn up and embodied in the submission."

Previous to that decision there had been general statements in other cases which lay down more clearly the principle upon which the decision must be taken to have proceeded. In *Aubert v. Maze* (1) Chambre J. said: "There is no doubt that an arbitrator is bound by the rules of law like every other judge," and in *Jager v. Tolme* (2) the judge said, "the council [that was the council of the London Produce Clearing House] are to give a decision. They are to decide and in the absence of fuller and wider powers expressly given, that means to decide according to the legal rights of the parties." The decision in *In re Astley and Tyldesley Coal and Salt Co.* (3) was cited in a recent case that came before the King's Bench Division: *Cayzer Irvine & Co. v. Board of Trade*. (4) In the course of his judgment, Rowlatt J., before whom the case first came, said (4): The Statute of Limitations (21 Jac. 1, c. 16) "does not in terms apply to arbitrations. It does not affect the debt. It only limits the remedy, and therefore it seems to me that in an arbitration it is a question of construction whether the submission requires the arbitrator to follow the analogy of the statute."

In the Court of Appeal (5) Lord Hanworth M. R. found it unnecessary to consider this question, which as he observed involved the point whether *In re Astley and Tyldesley Coal and Salt Co.* was correctly decided. Scrutton L.J. (6) reserved to himself liberty to consider "when the case arises before this Court whether [it] was rightly decided" and Romer J. also reserved his opinion upon that point. The case was taken to the House of Lords and is reported. Viscount Cave L. C. (7) in giving judgment, said: "My Lords, I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *In re Astley and Tyldesley Coal and Salt Co.* (3), that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against

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(1) (1801) 2 Bos. & P. 371, 375. (4) [1927] 1 K.B. 269, 272.
 (2) [1916] 1 K.B. 939, 953. (5) [1927] 1 K.B. 269, 284.
 (3) 68 L.J. (Q.B.) 252. (6) [1927] 1 K.B. 291.
 (7) [1927] A.C. 610, 614.

J. C. that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred."

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None of the other judges who took part in the decision of that case found it necessary to express any definite opinion upon the point, although for the purposes of the decision they were content to assume it. Such being the state of the authorities (the paucity of which may be explained by the fact that where contracts contain an arbitration clause the parties usually contemplate that their dispute will be disposed of), their Lordships are of opinion that the law was correctly laid down in *In re Astley and Tyldesley Coal and Salt Co.* Although the Indian Limitation Act does not in terms apply to arbitrations, they think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence. Were it otherwise a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen although the Legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts.

Their Lordships are accordingly of opinion that the first question of law must be answered in the affirmative.

The next question which arises is whether limitation applies in the present case so as to bar the claim of the respondents under the award which they have obtained. The judges of the High Court held that the arbitration proceedings which resulted in the award now under consideration were in effect a mere continuation of the former proceedings which had been instituted on July 15, 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed.

Their Lordships are unable to agree in this view. They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and that the proceedings instituted at a later date after the decision in the Privy Council had been announced cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. The hardships that might arise in such a case have, however, been expressly provided for by the sections to which reference will now be made.

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The Indian Limitation Act, unlike the corresponding English Act, contains an elaborate code of provisions which deal (inter alia), with the mode of computing the period of limitation prescribed for any suit, etc., and also with the exclusion from the period of limitation of time which has been occupied in legal proceedings. The clause specially founded on s. 14, sub-s. 1, is as follows: "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

There is a similar provision as to "applications" and appended to the section there is this explanation: "For the purposes of this section, a plaintiff or an appellant resisting an appeal shall be deemed to be prosecuting a proceeding."

It may be assumed that it had been ascertained before these provisions were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the

J. C. experience of their Lordships that the time necessary for the
 1929 decision in a suit may be of much longer duration than one
 is accustomed to in the Courts of Great Britain. Hence the
 RAMDUTT necessity for some provision to protect a plaintiff acting
 RAMKISSEN- bona fide from the consequences of some mistake which had
 DASS been made by his advisers in prosecuting his claim.
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Holding, as they did, that the proceedings before the second arbitrators were merely a continuance of the first arbitration, it became unnecessary for the learned judges of the High Court to deal with the question. It had, however, been dealt with by Greaves J. in the application which the appellants made to revoke the submission to the arbitrators and to restrain the present respondents from taking arbitration proceedings thereunder. He said: "It remains for me to decide whether in computing the period of limitation the time occupied in prosecuting the proceedings above referred to is to be excluded. It is urged that having regard to the wording of s. 14 of the Limitation Act this section cannot apply. This argument however does not seem to me to be well founded. If limitation, as I think it does, applies in arbitration proceedings, the law of limitation applicable is that laid down in the Limitation Act, 1908, which is expressed to apply to suits, appeals and certain applications to Courts. If, therefore, this Act is to be applied to arbitration proceedings notwithstanding the words above referred to, I see no reason why s. 14 of the Act should not apply. If it is said that the wording of the section is not apposite to arbitration proceedings it could equally be said that the wording of the Act itself is not apposite. In my view, therefore, in computing the period of limitation the time occupied in the proceedings which ended in the decision of the Judicial Committee is to be excluded."

Their Lordships are in agreement with the reasoning of the learned judge. Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in Court and resisting applications to set them aside. In their Lordships' opinion the analogy of the Indian

Limitation Act requires that an arbitrator should exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction. The Limitation Act has no application in terms to arbitration proceedings and as Greaves J. has pointed out, if the words "suit instituted, appeal preferred, and application made" in s. 3 are to be applied to arbitration proceedings it seems to follow that the same interpretation must be put upon them in s. 14, and that civil proceedings in a Court must be held to cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the judges of the dispute between them. There is no question here that the respondents were prosecuting with due diligence their claim against the appellants and that the second arbitration was founded on the same cause of action and was prosecuted in good faith before the previous arbitrator who from defect of jurisdiction was found not competent to exercise jurisdiction in the matter. If the period in question during which the respondents' claim was held up because of the proceedings instituted for the purpose of setting aside the first award and in obtaining final judgment on that question is excluded from the period of limitation, there can be no doubt that the respondents here were within the period prescribed. The result is that the anomaly is avoided of there being a different period of limitation in certain cases where a dispute has been referred to arbitration from that which is applied to disputes dealt with in the ordinary courts.

For these reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs to the respondents.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents: *Sanderson, Lee & Co.*

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 Feb. 4. BURMA OIL COMPANY, LIMITED } RESPONDENTS.
 --- (DEFENDANTS) }

ON APPEAL FROM THE HIGH COURT AT RANGOON.

Landlord and Tenant—Lease of Oil Sites—Royalties Payable on Oil won—Lessor's Right to Natural Gas—Construction of Lease—Transfer of Property Act (IV. of 1882), s. 108 (o).

The appellant, the owner of oil sites and grantee from Government of the right to win oil therefrom, leased the sites and the right to win oil for twenty-five years to the respondents, who agreed to pay royalties on oil won by them. In sinking wells, which did not produce oil in commercial quantities, the respondents found natural gas. They tapped the gas by pipes, and for six years used it for their own purposes:—

Held, that the appellant was not entitled to compensation for the gas so taken, since (1.) that right was not included in the right to royalties upon the oil won; and (2.) the lease, on its true construction, was not merely a lease for the purpose of winning oil, and the appellant having no property in the gas the respondents were entitled to reduce into possession and use it provided they did so without injury to the leased property: that view was not inconsistent with the Transfer of Property Act, s. 108 (o).

It was not necessary to decide whether the Upper Burma Land and Revenue Regulation, s. 31, reserves to the Government the right to natural gas.

Decree of the High Court affirmed.

APPEAL (No. 25 of 1928) from a decree of the High Court in its appellate jurisdiction (January 18, 1927) reversing a decree of the Court in its original jurisdiction.

The appellant, who had leased to the respondents three oil sites, brought against them in the High Court a suit claiming compensation for natural gas which the respondents had obtained from one of the sites and had used for their own purposes.

The facts appear from the judgment of the Judicial Committee.

By the lease dated June 5, 1918, the appellant leased to the respondents "his oil well sites, Nos. 3993, 3978, 3995,

*Present: LORD HAILSHAM L.G., LORD CARSON, and SIR CHARLES SARGANT.

and the right to win oil therefrom for a period of 25 years from date hereof," and agree that during the lease they should have possession of the said oil sites. The lessor covenanted as to the validity and maintenance of the Government grants of the right to win oil; and the lessees agreed to begin to drill in six months, but they were to be sole judges whether the quantity of oil produced rendered the continuance of work advisable. The lessees agreed to pay royalty at the rate of 8 annas for every 100 viss of oil produced by them from the sites. The lessor agreed to allow the lessees, their agents drillers, etc., free access upon the well sites "for any of the purposes of this lease."

The trial judge (Das J.) held that the right to royalty upon the oil involved a right to compensation for the gas taken, and ordered an inquiry as to the amount of the compensation.

Upon appeal the decision was reversed and the suit dismissed. The learned judges (Rutledge C. J. and Brown J.) held that oil upon which royalty was payable did not include gas. They said that the plaintiff's advocate had admitted that the plaintiff was not owner of the gas at the date of the Government grant or of the lease, and they held that the Oil Field Act, 1918, and the rules thereunder, did not enlarge his rights; and accordingly that "the ownership of natural gases, so far as they are capable of ownership, remained in the Government."

1929. Feb. 4. *Dunne K.C. and Pennell* for the appellant. Having regard to *Barnard, etc., Oil and Gas Co. v. Farquharson* (1) the appellant concedes that the right to a royalty on the oil won did not carry a right to be paid for gas obtained. The appellant was, however, entitled to compensation. As owner of the sites he was entitled to all the profits and rights in the land save so far as the Government, in the right of conquest, had reserved them to itself. The effect of U.B. Regulation III. of 1889, ss. 23, 27 and 31, is to recognize private ownership in lands other than "state

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J. C. 1929 lands," and though under the Regulation and the Oil Fields Act, 1918, the right to oil is reserved to the Government, there is no reservation as to natural gas. The lessor did not grant the respondents the right to the gas, and the right remained in the appellant. Every invasion of a right of property, whether corporeal or incorporeal, gives a right of action against the invaders: *Mansell v. Valley Printing Co.* (1). Having regard to the provisions of the lease it clearly

was merely for the purpose of winning oil, and by the Transfer of Property Act, 1882, s. 108 (o), the lessee was not entitled to use it for any other purpose. [Reference was made also to the U.B. Land Revenue Manual, 1900, p. 227.]

Clement Davies K. C. and *Gordon Brown* for the respondents. The lease gave the respondents the right to possession of the oil sites, and they were entitled as against the appellant to reduce the gas into possession. Owing to the nature of the gas, there was no property in it until it was reduced into possession; any adjoining owner could have tapped it. Even if the lease was merely for the purpose of winning oil, the respondents were entitled to any ancillary profit which arose in process of doing so: *Robinson v. Milne*. (2)

Dunne K.C. replied.

The judgment of their Lordships was delivered by

LORD HAILSHAM L. C. This is an appeal from the High Court at Rangoon which reversed a decision of the Court of first instance in favour of the present appellant, who is the plaintiff in the action.

The suit is brought to recover compensation for the use by the respondents of a quantity of gas which had been taken by the respondents from a certain oil well site of which they were in possession under a lease granted by the appellant. It appears that in Upper Burma, under the Upper Burma Land and Revenue Regulation of 1889, the right of private ownership in land is recognized, but it is expressly provided in s. 31 that the right to all minerals, coal and earth oil, shall be deemed to belong to the Government, and the Government

shall have all powers necessary for the proper enjoyment of its right thereto.

The facts proved are, that the appellant was before the year 1912 in possession of oil well sites in Upper Burma. By a grant dated April 25, 1912, after reciting the fact that the appellant was in possession of the well site in question the Government granted to the appellant a right to win and get earth oil from the said well site in such manner as he or his assignees might think fit, and to dispose of all the earth oil to be gotten therefrom subject to the payment of a royalty to the Government.

By an indenture dated June 5, 1918, the appellant granted a lease to the respondents for a period of twenty-five years, and the question to be determined turns very largely upon the construction to be placed upon that lease. The lease recites that the appellant is the owner of certain oil well sites including the one now in question, and that he has obtained from the Government a grant of the right to win oil from the said oil well sites; and it proceeds to declare that the appellant hereby leases to the respondents his oil well sites and the right to win the oil therefrom for a period of twenty-five years from the date thereof. By clause 2 the indenture provides that during the period of the lease the said oil well sites and the grants for the same shall be made over to the possession of the lessees and the said possession shall not be withdrawn by the lessor. By clause 9 the lessees agreed to pay royalty at a fixed rate upon oil won by them. After the execution of the indenture, the respondents proceeded to sink wells for the purpose of obtaining oil upon this site as well as others included in the lease. No oil in any commercial quantity was obtained, but gas came from the well so drilled, and the respondents gave up the search for oil and by pipes were able to enclose the gas and use it for their own purposes in and about the neighbourhood of the site. After this had been going on for some six years, the appellant brought this action, claiming compensation for three years' user of the gas so taken. The trial judge reached the conclusion, that, on, the construction of the lease it was

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J. C. clear that oil included gas, and accordingly he held that
 1929 since the respondents had agreed to pay a royalty on oil
 U PO taken from the site, they must pay compensation for the
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 BURMA OIL Co. In the Appellate Court that decision was reversed. The
 — Court held that the trial judge was wrong in thinking that oil included gas, and they came to the conclusion that the appellant had no property in the gas, and on that ground they decided that he could not claim compensation for its use by the respondents. In their Lordships' opinion it is quite clear that oil does not include gas and, therefore, that the decision of the judge of first instance cannot be supported on the ground upon which it is based.

Before their Lordships' Board, Mr. Dunne, for the appellant, argued that the lease of June, 1918, upon its true construction was merely a lease to the respondents of the right to win oil from the site, and he argued, therefore, that any gas which was obtained in the course of that operation and any gas which was obtained from the site after that operation had been given up was the property of the appellant, and that if the respondents chose to make use of it, they must pay compensation for that use. In their Lordships' opinion this is to place far too narrow a construction upon the terms of the indenture of lease. That indenture in terms expressly recites the ownership of the sites and of the grant as being two separate things and proceeds in its terms expressly to lease to the respondents both the sites and the right to win oil therefrom and to transfer to the respondents the sites as well as the grant of the right to win oil from them. In their Lordships' judgment the respondents were from the date of that indenture in possession of the site itself and not merely holders of the Government grant. In those circumstances it seems to their Lordships clear that unless it can be said that the gas was always the property of the appellant, it never became his property at any material date. No authority could be produced for the view that gas under the soil before it had been tapped or released was the property of the appellant, and it seems to their Lordships difficult to reconcile

any such view with the well known authorities as to underground water not flowing in any defined channel. No doubt it is true that the gas could be reduced into possession, and when reduced into possession it became the property of the person who had so reduced it. But in their Lordships' judgment the gas was not reduced into possession by the appellant but by the respondents who had dug the well and who took the gas as it came out of the well and used it. This seems to be sufficient to dispose of the case without discussing whether or not s. 31 of the Upper Burma Land and Revenue Regulation on its true construction reserves the right to gas to the Government as seems to have been the view of the Courts below.

A further argument was based upon the provisions of s. 103 (o), of the Transfer of Property Act, 1882, which provides that the lessee of property must not use the property for a purpose other than that for which it was leased. In their Lordships' judgment it is not necessary exhaustively to discuss the limits of that provision, but there seems to be nothing inconsistent with its terms in the use of gas which is necessarily set free by reason of the sinking of the oil well for the respondents' own purposes without doing any damage or any injury to the property leased.

For those reasons their Lordships are of opinion that the appeal fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *J. E. Lambert.*

Solicitors for respondents: *Linklaters & Paines.*

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J.C.* SEETHAYYA AND OTHERS (DEFENDANTS) APPELLANTS;
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[AND CONNECTED APPEALS.]

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Madras Tenancy—“Estate” under *Act of 1908—Shrotriyam Grant—Construction of Grant—Whether of Land Revenue only—Grant by Despandyar to non-resident Brahmins—“Mauje”—Secondary Evidence of Grant—Copy more than thirty years old—Authentication by Indorsement—Indian Evidence Act (I. of 1872), ss. 65, 90—Madras Estates Land Act (Mad. Act I of 1908), s. 3, sub-s. 2 (d).*

About 1689 an agraharam village was granted as shrotriyam, the grant stating that “as we have granted the said agraharam you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy.” The grant was by despandyars, revenue officers and farmers of revenue, to Brahmins who did not reside in the village. The village was described in the grant as a “mauje”, a Telugu form of “mauza”. The grant had been recognized by the British Government, and it was admitted that the grantees had not been owners of the kudivaram:—

Held, that having regard to the terms of the grant and the character of the grantors and grantees, the grant was of the land-revenue only; consequently, by the Madras Estates Land Act, 1908, s. 3, sub-s. 2(d), the village was an estate under that Act, and suits to eject the ryots could not be brought in the Civil Court.

A shrotriyam grant may be of the kudivaram as well as of the melvaram; the statement to the contrary in Wilson’s Glossary was based upon decisions which have since been questioned.

The word “mauje” in a Telugu document indicates a village in which there were peasant proprietors owning cultivable lands. Observation to that effect by Sadashiva Ayyar J. in *Venkata Sastrulu v. Sitaramudu* (1914) I.L.R. 38 M. 891, 892 accepted as correct.

The original grant was lost, but there was produced from the custody of respondents, successors to the grantee, a document in Telugu purporting to be a copy of the grant and of a translation of a Persian dumbala of 1765. The document bore an indorsement, signed by three predecessors of the respondents: “Originals have been retained by us and copies have been filed 1858”:—

Held, that the document was properly admitted under the Indian Evidence Act, ss. 65, 96, as secondary evidence of the terms of the

*Present: LORD PHILLIMORE, LORD BLANESBURGH, LORD ATKIN, LORD SALVESEN, and SIR LANCELOT SANDERSON.

grant, the statement in the indorsement authenticating the copy being evidence as a statement by a deceased person in a document relating to a relevant fact, also as an admission by the respondents' predecessors.

Decree of the High Court I.L.R. 46 M. 92 reversed.

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CONSOLIDATED APPEAL (No. 47 of 1925) from orders of the High Court (April 5, 1922) in an appeal under the letters patent, reversing orders of a Division Bench which had affirmed orders of the Principal District Munsif of Tenali.

The respondents brought suits in the Munsif's Court to eject the appellants, who were ryots, from lands in the agraharam village of Arepalli. The question in the litigation was whether the village constituted an estate within the Madras Estates Land Act, 1908, in which case the Revenue Courts had exclusive jurisdiction in the suits by s. 189 of the Act. It was contended by the defendants that the village was an "estate" within s. 3, sub-s. 2 (d), which is set out in the present judgment, and the substantial question arising was whether the inam grant to the plaintiffs' predecessors included, as they contended, the kudivaram, or was, as the defendant's contended, merely of the melvaram, or land-revenue.

The original grant was lost, but there was produced from the custody of certain of the plaintiffs a document (exhibit 1) which was more than thirty years old, and purported to contain a copy of the grant of 1689. This document appears in the judgment of their Lordships.

The District Munsif, who first tried the suits, held that the Civil Courts had no jurisdiction; he directed the return of the plaints for presentation in the Revenue Court. The plaintiffs appealed to the District Court, and the appeals were transferred by order to the High Court, which held that the grants were presumably grants of the land, and remanded the suits for recording revised findings upon the evidence.

The suits came upon remand before a newly appointed District Munsif, who held that exhibit 1 was inadmissible in evidence, and that the village was not an estate within the Act of 1908. He made decrees for ejectment.

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The appeals were then heard together by Ayling O. C. J. and Odgers J. The former held that exhibit 1 was admissible in evidence, and that upon its true construction the respondents' predecessors had acquired only the melvaram: he accordingly was of opinion that the Civil Courts had no jurisdiction. Odgers J. was of the contrary opinion upon both points. Accordingly the decision of the Munsif returning the plaints was affirmed under s. 98 of the Code of Civil Procedure.

Appeals by the defendants under s. 15 of the letters patent were heard together by Schwabe C. J., Oldfield and Coutts-Trotter J.J., and were allowed. The learned judges held that exhibit 1 was admissible in evidence, but that it was equally consistent with the grant having been of the land-revenue or of the land itself; that therefore, under the decision of the Full Bench in *Muthu Goundan v. Perumal Iyen* (1) (which was subsequently disapproved by the Privy Council in *Chidambara Sivaprakasa Pandara v. Veerama Reddi* (2), the grant was to be presumed to have been of both varams, and that the evidence did not negative that presumption. The suits were accordingly remanded to be disposed of. The letters patent appeal is reported at I.L.R. 46 M. 92.

1928. Nov. 20, 22, 23, 26. *De Gruyther K. C. and Parikh* for the appellants.

Dunne K.C. and Narasimham for the respondents.

Upon the admissibility of exhibit 1 in evidence reference was made to the Indian Evidence Act, 1872, ss. 32, sub-s. 7, 63, 65, 90, 114; and upon the construction and effect of the grant to *Suryanarayana v. Patanna* (3); *Upadrashta Venkata Sastrulu v. Divi Seetharamudu* (4); *Chidambara Sivaprakasa Pandara v. Veerama Reddi* (2); also to *Venkatanarasimha Naidu v. Dandamudi Kotayya* (5) as to the relation between zamindars and ryots in pre-British days; to *Venkata Sastrulu v. Sitaramudu* (6) and to Wilson's Glossary, s.v. "mauza," as to "mauje"; to Fifth

(1) (1921) I.L.R. 44 M. 588. (4) (1919) L.R. 46 I.A. 123.

(2) (1922) L.R. 49 I.A. 286. (5) (1897) I.L.R. 20 M. 299.

(3) (1918) L.R. 45 I.A. 209. (6) (1914) I.L.R. 38 M. 891, 892.

Report, Madras, vol. ii., p. 157 and Wilson's Glossary as to despandyas; and to Baden-Powell's Land Systems of British India, vol. iii., p. 134, as to sanads given by the Moghul to zamindars.

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1929. Feb. 14. The judgment of their Lordships was delivered by

LORD ATKIN.—This is a consolidated appeal from the judgment of the High Court at Madras given in eleven suits of ejectment brought by the respondents against the respective appellants. Seven out of the eleven suits were instituted in 1913, and the only question so far decided and the only question before the Board is whether the Civil Court in which the actions were brought had jurisdiction and not, as the appellants contend, the Revenue Courts. The determination of this question has required recourse on seven different occasions to the Courts and has occupied nine years in Madras. The case has taken six years more to reach the Board. Their Lordships deplore this delay, which was obviously much greater than was necessary, and reaches the borders of a scandal. They do not, however, propose to recapitulate the various stages in which the case toiled to and fro between the lower Courts and the High Court, or to apportion blame, but will address themselves at once to the question of jurisdiction. This question arises under the Madras Estates Land Act, 1908. By s. 189 of that Act exclusive jurisdiction is given to the Revenue Courts to entertain all suits set out in schedule A, which includes a suit to eject a ryot. This, by reference to s. 6, involves the question whether the ryot holds land in the "estate" of a landholder, and we are thus brought to the definition of estate, which by s. 3 (d) means "any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made or recognised by the British Government or any separated part of such village." The present respondents claim under an inam grant made "about 250 years ago." The grant has been recognized by the British Government.

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In the course of these proceedings the respondents have admitted that they did not own the kudivaram before the grant, and that they did not acquire the kudivaram independently of and after the grant. The question of jurisdiction therefore depends upon whether the inam grant was of the "land-revenue alone"; whether it granted the melvaram alone or also the kudivaram, i.e., the land-revenue alone or also the cultivator's share of the produce.

The principal question in the case is whether the terms of the original grant were proved, and, if so, what is the proper construction to be put upon them. The respondents' case was that the original grant was lost; its express terms were not proved; and that the proper inference from all the facts, including acts of ownership by themselves and their predecessors, was that under the grant they received the kudivaram. The appellants, on the other hand, said that the respondents had disclosed a copy of the original grant which the appellants tendered in evidence. They contended that the document in sufficiently plain terms gave the melvaram only. The respondents, while denying the admissibility of the copy, said that the grant on its true construction gave the kudivaram as well as the melvaram, or at any rate was so ambiguous as to admit extrinsic evidence leading to the same result.

The document tendered was a Telugu document purporting to be a copy of two documents. The first was a document making a grant of the village in question to the predecessor of the plaintiffs for 6 pagodas, setting out the boundaries and signed by the grantors. The second was a Telugu translation of a Persian Dumbala dated 1765 A.D., increasing the revenue to be paid by the holders from 6 to 25 pagodas. The document contains the indorsement "originals have been retained with us and copies have been filed 1858," signed by the then predecessors of the respondents, one of whom, Ponnappalli China Ramaswami, was a plaintiff to some of the original suits now before the Board, but died at an advanced age during the proceedings.

Their Lordships agree with the learned Chief Justice and his colleagues in the High Court that the document was admissible as evidence of the terms of the lost original. The document is over thirty years old, and is produced from proper custody. By s. 90 of the Evidence Act, 1872, the Court may therefore presume the signatures authenticating the copy to be genuine. The statement to which the signatures are appended—namely, that the document is a copy of the original—appears to be evidence both for the reason given by the Chief Justice, i.e., as a statement made by a deceased person in a document relating to a relevant fact, and also as an admission made by a party and a predecessor in title of the parties.

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The document being admissible is secondary evidence of the terms of the original grant. The Court therefore must proceed upon the footing that the express terms of the original written grant are before it, and must proceed to construe them. Some confusion has been introduced into the case by conflicting decisions as to presumptions to be made in construing such a grant. The original District Munsif held that there was a presumption that such a grant did not give the kudivaram.

The High Court, relying on a decision of a Full Bench of the Court in *Muthu Goundan v. Perumal Iyen* (1), took the view that the presumption was that both the melvaram, and kudivaram are included. It is, however, made clear by the subsequent decision of this Board in *Chidambara Sivaprakasa Pandara Sannadigal v. Veerama Reddi* (2) that there is no presumption either way, and that each case must be decided on its own circumstances.

The document is in the following terms: "Deed of gift executed and given on the 15th day of Adhika Chaitra Sudham of the year Parabhava, corresponding to 1610 of the Era of Salivahana, in favour of Ponnappalli Annappa Garu, who is eager in performing the six acts, viz.: yagna, yajana adhyayana, adhyapaka, dana and pratigraha by Puligadda Mallaparaju, Lakaraju, Perraju, and Mazumdar.

(1) I.L.R. 44 M. 588.

(2) L.R. 49 I.A. 286, 303.

J.C. Papanna, Rajas of Komaravole, and residents of Nizampatam.

1929 As we have granted to you the shrotriyam of Arepalli agraaharam village, Nizampatam taluk, in the name of Siva on the occasion of the lunar eclipse, for 6 pagodas, you shall enjoy the same accordingly from son to grandson and shall live happily.

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Signatures of the Rajas:—

(Signed) Mallaparaju.

(Signed) Perraju.

(illegible.)

Memorandum of the description of the boundaries for the agraaharam executed and given on the 9th day of Chaitra Bahulam of the year Parabhava corresponding to 1610 of the Era of Salivahana in favour of Ponnappalli Annappa Garu who is eager in performing the six acts, viz.: Yagna, Yajana, Adhyayana, Adhyapaka, Dana and Pratigraha by Puligadda Mallaparaju, Lakaraju, Perraju, Mazumdaru Papanna Garu, Rajas of Komaravole, residents of Nizampatam.

As we have granted to you Arepalli agraaharam attached to Nizampatam, fixing a srotriyam of 6 pagodas thereon, particulars of the boundaries which have been shown in respect thereof are as follows: [here followed the boundaries.]

As we have granted to you the said agraaharam, you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy.

Signatures of Rajas:—

(Signed) Mallaparaju.

(Signed) Papanna.

(Illegible.)

A copy of the Telugu translation written on the right-hand side of the dumbala written in the Persian language.

Having fixed a srotriyam of 25 pagodas as fixed rent for next Fasli 1172 in respect of maluva and motarfa, libabu and tobacco of Arepalli village, sircar Nizampatam, a cowle has been given by Nageshwara Dikshitulu, Somanna, Subbanna, Somayajulu and others (illegible) referred to in cowle for the coming Fasli 1172. Without allowing it to

remain (illegible), rich ryots should be permanently selected to (illegible) satisfaction and cultivation should be carried on extensively and the produce should be tendered to the sircar in season.

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30th Mahazulahali 1175. Hizra.

Originals have been retained with us and copies have been filed 1858 (torn).

(Signed) Ponnappalli China Ramaswami.

(Signed) Ponnappalli Suryanarayana Somayajulu.

(Signed) Lakshmipathi.

A copy of the dumbala, a rough sketch of the village and a copy of the kyfiat of the villagers have been filed."

The learned District Munsif of Tenali, who decided that he had no jurisdiction, delivered a careful and able judgment with which, on the point of construction, their Lordships, except on the question of presumption, fined themselves substantially in accord. He relied on four main points:—

1. The grant purports to be a grant "of shrotriyam" or "as shrotriyam." "Shrotriyam", according to Wilson's Glossary, means a grant of "lands or a village held at a favourable rate, properly an assignment of land or revenue to a Brahman learned in the Vedas, but latterly applied generally to similar assignments to native servants of the government, civil or military, and both Hindus and Mohammadans, as a reward for past services. A srotriyam grant gives no right over the lands, and the grantee cannot interfere with the occupants as long as they pay the established rents." If the above definition were accepted in its full terms the case would be concluded in favour of the appellants. But the learned Chief Justice in his judgment points out reasons for supposing that Mr. Wilson in the last sentence was purporting to give the effect of legal decisions which since his time have been questioned, and their Lordships are not prepared to differ from the view that a shrotriyam grant may in fact grant the kudivaram as well as the melvaram. But in this case the document itself in the final recital uses the term again. "As we have granted to you the said agraharam you should enjoy the same from son to grandson, paying the shrotriyam thereon.

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and be happy." In this phrase the term can only mean revenue; and though their Lordships could not consider this consideration in itself conclusive, it points to the construction contended for by the appellants. It is not without significance, though it is later than the document under construction, that the same use of the term is found in the translation of the Persian order, "Having fixed a shrotriyam for 25 pagodas," etc.

2. The grant was of a "mauje." (1) Their Lordships accept the view expressed by Sadasiva Ayyar J. in *Venkata Sastrulu v. Sitaramudu* (2), that the phrase indicates "a village in which there were peasant proprietors owning cultivable lands even then." Probably no more weight should be attached to this than may be borne by the circumstance that the village granted was presumably a revenue producing village, some of the lands of which were already occupied. Their Lordships cannot accept the view favoured by the Chief Justice that the word in the particular context merely means a defined place.

3. It is agreed that the grantors were despandyas who were revenue officers or farmers of revenue under the paramount authority. It is pointed out that this fact does not exclude the possibility of the grantors being themselves personally possessed of the land, i.e., of the kudivaram rights. This no doubt is so, but the strong probability is that they granted that which in their position as despandyas they would possess—namely, the rights over the revenue.

4. The Brahmins represented by the grantee were learned Brahmins apparently not resident in the village granted, but resident about two miles away. This circumstance by itself is by no means conclusive. At the same time it appears to their Lordships to make it more probable that the grant was in the nature of an endowment of revenue rather than of land for the purposes of cultivation.

(1) See I.L.R. 46 M. 92, 97. The word did not occur in the document, but the name of the village was followed by a Telugu character equivalent to the letter 'M,' which it was agreed was an abbreviation of "mauje." Wilson's Glossary recognizes "mavuje" and "mauje" as Telugu forms of 'mauza.'

(2) I. L. R. 38 M. 891, 892.

The learned Chief Justice deals with each of these points separately, and as to each of them finds the point inconclusive, and apart from the presumption upon which he relies, finds the document equally consistent with a grant of both varams as of the melvaram only. In their Lordships' opinion this is to ignore the weight which is obtained from the effect of the whole. Taking into account all the considerations mentioned, their Lordships are of opinion that they lead strongly to the conclusion that the grant was of the melvaram only, and they so construe the document.

In view of the admissions made for the purposes of these cases that the respondents did not acquire the kudivaram subsequently to the grant, it becomes unnecessary to consider the subsequent acts of the parties, and the inferences to be drawn from them. The document is unambiguous and the rights given by it must be determined by its words. It follows that the decree of the High Court on the letters patent appeal, dated April 5, 1922, must be set aside, and the decree of the High Court, dated October 19, 1921, be restored. The appellants should have their costs of the letters patent appeal and before this Board. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas Grant & Dold.*

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J. C.* RANI KRISHNA KUMARI DEVI }
 1929 (PLAINTIFF) } APPELLANT;
 ————— —————
 Feb. 21. AND
 BHAIYA RAJENDRA SINHA AND }
 ANOTHER (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE CHIEF COURT OF OUDH.

Oudh Taluqdari Estate—Will of Taluqdar—Mahal placed under Act of 1900 after Will but before Death of Testator—Devise of bare life Interest to Daughter in law—Validity under Act of 1900—“Stranger”—Exclusion of statutory Heirs—Oudh Settled Estates Act (II of 1900, U.P.). s. 18.

In 1907 a taluqdar, entered in lists 1 and 2 under the Oudh Estates Act, 1869, s. 8, executed and registered a will by which he devised the whole of his property to his widow for her life, and subject thereto to his daughter in law for her life, in both cases without power in any way to dispose of or incumber any part of it, the property to descend subsequently to the then living heirs under the Act of 1869. In 1908 the taluqdar made an irrevocable declaration under the Oudh Settled Estates Act, 1900, ss. 11, 12, that in future a mahal, part of his taluqdari estate, should be held under that Act; that declaration was pursuant to an application for permission made before the execution of the will, and was recited therein. The testator died in 1913. Upon the death of his widow the validity of the devise of the mahal to his daughter in law was disputed:—

Held, that the devise was invalid under the proviso to s. 18 sub-s. 2, of the Act of 1900 as it was not “according to this Act,” in that it was of a bare life interest without the incidents attached to the statutory estate thereby created; effect could not be given to it as a gift of the profits for life, as that would be to subject the estate to a charge or incumbrance which was contrary to the proviso.

It was unnecessary to determine whether (as held by the Chief Court) the devise was also invalid under the proviso as being to a “stranger so as to exclude from succession any person belonging to any of the classes specified in s. 22 of the Oudh Estates Act, 1869.” Observations as to the meaning and effect of that provision.

Decree of the Chief Court (I.L.R. 2 Luck. 97) affirmed.

APPEAL (No. 139 of 1927) from a decree of the Chief Court of Oudh in its appellate jurisdiction (December 20, 1926), which affirmed, so far as the subject of the present appeal is concerned, a decree of that Court in its original jurisdiction (November 18, 1926).

*Present: LORD PHILLIMORE, LORD BLANESBURGH, LORD ATKIN, LORD SALVESEN, and SIR LANCELOT SANDERSON.

In 1926 the appellant brought a suit in the Chief Court claiming possession of the estate of the Raja of Bhinga, who died in 1913. The plaintiff was the widow of the only son of the deceased Raja; the first defendant-respondent, who was in possession, was the younger brother of the Raja. The plaintiff-appellant claimed that under the will, dated June 17, 1907, of the deceased Raja she was entitled upon his widow's death to a life interest in the whole property.

In 1908 the late Raja had made an irrevocable declaration under the Oudh Settled Estates Act, 1900, ss. 10, 11, that Mahal Binga, which with another mahal formed a taluqdari estate mentioned in lists 1 and 2 of the Oudh Estates Act, 1869, should in future be held subject to the provisions of the Oudh Settled Estates Act, 1900; that declaration was made in pursuance of an application which was made by the late Raja before he executed the will, and was referred to in the will.

The material terms of the will appear from the judgment of the Judicial Committee.

The trial judge (Misra J.) held that so far as the suit related to Mahal Binga, the validity of the bequest to the plaintiff depended upon s. 18, sub-s. 2, of the Oudh Settled Estates Act, 1900, and that the bequest of a life estate in the mahal to the plaintiff was invalid under the proviso to that subsection, in that it was to a stranger so as to exclude from succession the defendant, who admittedly would have been entitled to succeed under s. 22 of the Oudh Estates Act, 1869, upon an intestacy. So far as the will related to the property other than Mahal Binga it was valid, and the plaintiff was entitled to possession. He decreed accordingly.

The plaintiff appealed so far as the decree rejected her claim to Mahal Binga. The appeal was heard by Stuart C. J. and Wazir Husain J. and dismissed. The learned judges affirmed the view that the bequest was invalid under the above mentioned proviso to s. 18 of the Act of 1900. The appeal is reported at I.L.R. 2 Luck. 97.

1928. Nov. 26, 27, 29. *Upjohn K. C., De Gruyther K. C., Dunne K.C., W. Wallach and B.P. Singh* for the appellant. The

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mahal was not brought within the Act of 1900 until after the execution of the will; the Act accordingly did not affect the wider power of disposition which the Raja had under s. 11 of the Act of 1869. The appellant was not a "stranger" within the meaning of the proviso to s. 18, sub-s. 2, since she was recognized by the Oudh Estates Act, 1869, as having an interest upon an intestacy, in that under ss. 24 and 27 she was entitled to maintenance. The words in the proviso "so as to exclude, etc.," do not define "stranger". The devise did not act as an exclusion, but merely as a postponement, of the estate of the heir under s. 22. The Act of 1900 does not preclude the bequest of a life interest to a person living at the death of the testator if there is a reversion to the heir under s. 22. The bequest not being one to a stranger was good under s. 11 of 1869 as an executory bequest: *Soorjeemoney Dossey v. Denobundoo Mullick* (1); *Bhupendra Krishna Ghose v. Amarendra Nath Dev.* (2)

Macmillan K. C., Sir George Lowndes K. C., Kenworthy Brown and Jopling for the respondents. The proviso to s. 18, sub-s. 2, prevents effect being given to the devise as an incumbrance; it must therefore purport to give an estate. But the estate given was not one "according to this Act," and was therefore bad under the proviso. The object of the Act was that estates settled under the Act should be in the hands of one of the relations mentioned in s. 22 of the Act of 1869 without the intervention of any one outside that Act. Having regard to s. 15 the testator could not have given the life estate inter vivos. Each holder of an estate under the Act of 1900, except the testator's widow, is a fresh stock of descent, and has by s. 16 power to lease; the devise not being with these incidents is not one "according to this Act." Further the appellant was a "stranger" within the proviso. The words "so as to exclude, etc.," define that word. The word is commonly used in law of a person outside a particular class; e.g., stranger to a power, stranger as to a right to pre-empt, stranger in blood (Succession Duty Act, 1853, s. 13). The same form of words is used in the amending

Act of 1917, though they had been so interpreted. The bequest was one which excluded the respondent, though only for a period.

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De Gruyther K. C. replied.

1929. Feb. 21. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The sole question for decision on this appeal is whether a devise of the estate of Bhinga in Oudh made by the will of a former Raja of Bhinga in favour of his daughter in law, the plaintiff-appellant, is invalid in view of the provisions of the Oudh Settled Estates Act, 1900, to which, at the testator's death, although not at the date of his will, the devised property was subject. By a judgment and decree of the Court of first instance of the Chief Court of Oudh, affirmed in this respect by a judgment and decree of the Court of first appeal dated December 20, 1926, the devise has been held to be invalid. Hence the present appeal by the devisee.

The testator, Raja Udal Pratap Sinha Deo Somyaji, was the last male holder of the estate of Bhinga. He was a taluqdar, and his name is entered in lists 1 and 2 prepared under s. 8 of the Oudh Estates Act I. of 1869, to which it will be convenient to refer as the Act of 1869. In 1906 the Raja was desirous that his Mahal Bhinga should become a settled estate subject to the provisions of the Oudh Settled Estates Act, 1900—an Act which similarly will be referred to as the Act of 1900. He was in 1906, and he remained until his death, owner of two other mahals—Mahal Lakma and Mahal Usraina—and also of certain furniture and movables. Over these further properties he was then, and apparently he desired to remain, possessed of full disposing power. It was only Mahal Bhinga that he desired to bring under the restrictions of the Act of 1900, and his application to the Local Government Board related to that mahal alone. The application—one for permission to declare that the mahal might in future become a settled estate held subject to the provisions of the Act of 1900—was made in the same year,

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 1929 by notification dated April 24, 1908, granted the permission
 ————— asked for, and the Raja on May 21, 1908, by a statutory
 KRISHNA declaration made irrevocable and duly registered and published
 KUMARI on September 5 following, declared that Mahal Bhinga should
 DEVI thereafter be held subject to the provisions of the Act of
 BHAIYA 1900. And such was its position at his death on July 13, 1913.
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The will of the Raja in which is contained the devise of the mahal now disputed was executed by him on June 17 and registered on June 22, 1907—that is to say, while his application to Government was still in suspense.

On this circumstance has been based a contention for the appellant which, although less strongly urged than others presented on her behalf, may be dealt with at once, being first in logical order, and involving, as it does, no other considerations than such as are peculiar to itself. The contention is that the validity or otherwise of the devise of Mahal Bhinga to the appellant must be determined regardless of the provisions of the Act of 1900, inasmuch as only at a date subsequent to the execution of the testator's will did the mahal in any way become subject to the provisions of that Act.

Their Lordships were not impressed by this contention any more than had been either of the Indian Courts. It may, indeed, they think, be summarily disposed of by reference merely to the well known rule that the will of this testator without, as is agreed, any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time.

In the present instance, however, their Lordships are not required, in this matter, to have recourse to general principle. The testator, and in a sense fatal to this contention of the appellant's, has disposed of it himself. Having recited at the outset of his will that he was a taluqdar within the meaning of the Oudh Estates Act, 1869; that he had recently

applied for permission to declare that his estate of Bhinga should in future be held under the provisions of the Act of 1900; that his application was then still pending and that permission had not hitherto been either granted or refused, the testator proceeded to declare that in exercise of (inter alia) the testamentary powers conferred upon him by the Act of 1900 (if the same should be applicable) he desired to provide for the devolution and application of all his property, movable and immovable, including his estate of Bhinga, whether the permission aforesaid should be granted or refused, and whether in the former case the statutory declaration in pursuance thereof should or should not be executed and registered. And thereafter follow the dispositions of his will, including that now in debate.

It would be difficult, their Lordships think, to frame a form of exordium more clearly indicating that, in full view of the likelihood that the Mahal Bhinga might before his death become subject to the Act of 1900, it was the testator's desire that his dispositions thereof should nevertheless, in that event, have effect to the fullest extent thereby permitted. It is not inconsistent with this view of the words he uses that the testator may well have supposed that the effectiveness of these dispositions would in no way be impaired by the Act.

In the result, therefore, whether this first contention of the appellant's be tested in the light of general principle or whether its soundness be checked by reference to the particular terms of the testator's will, the result is the same. It may be expressed in the words of the learned trial judge. The will of the Raja, so far as it devised to the appellant an interest in the Mahal Bhinga, cannot "be considered to be operative except in so far as it conformed to the provisions" of the Act of 1900. How far then was this devise conformable to these provisions? That is the question which has now to be answered.

And first as to the gift itself. Its precise effect will not be missed if it be read with this preface—namely, that the property referred to in the course of it has been previously described by the testator as "all my property and estate

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whatever and wheresoever situate," and that the gift in the events which have happened became operative, if it has any validity at all, upon the death on April 30, 1926, of the testator's widow, to whom by the clause immediately preceding, and by the same form of words, had been given an interest in the property for her life. The actual words of the gift are as follows: "And subject as aforesaid. . . . I give devise and bequeath my said property and estate to Kumar Rani Srimati Krishna Kumari Devi, my daughter-in-law, the wife of my only surviving son and heir for and during the term of her natural life but so that she shall have no power under any circumstances by sale, alienation, mortgage or otherwise, to dispose or incumber the whole or any portion of my movable or immovable property for any period extending beyond the term of her natural life." And the gift over may not be without importance. "And upon her death in default of an adopted son if authorised by her husband to adopt a son I direct that my said property and estate shall descend to the person or persons then living who under the provisions of the said Act I. of 1869 would be entitled to succeed thereto on the failure or determination of the limitations herein before contained."

The testator has not, it will be seen, dealt with Mahal Bhangi separately from property over which in every event his powers of disposition were unfettered. The mahal is included in a general residuary bequest. Further, he has phrased his gift to the appellant in terms identical with the immediately preceding gift of the same property to his widow. In this he has apparently considered himself at liberty to disregard the great difference which, as will be seen, is made under the Act of 1900 between a testator's powers of devise of a settled estate in favour of a widow on the one hand and a daughter in law on the other. The draftsman may nevertheless in the result have conformed to the restrictions of the Act of 1900. But he has not been too sensible of their existence.

At this point, in view of the provisions of that Act, to which close attention must later be directed, it will be

convenient to accentuate three further things in relation to these quoted words of gift.

First, the interest taken by the appellant under them is, in the strictest sense, an interest for her life only. She is expressly debarred under any circumstances or by any form of alienation from disposing of the whole or any portion of the property for any period beyond her own life. Any lease granted by her, for example, must determine with her death.

Secondly, the appellant does not—and neither did the widow—become under the gift a fresh stock of descent of any of the property bequeathed. On the death of the widow Mahal Bhinga, according to the gift, passed to the appellant; on the death of the appellant it is to pass under the gift over to persons who must be strangers in blood to herself.

Thirdly, the destination under the gift over, on the death of the appellant, is not, putting it broadly, to the heir at law of the testator at his own death. The gift is, in effect, to the person or persons living at the appellant's death, who, under the provisions of the Act of 1869, would have been entitled to the testator's property had he at the same moment died intestate with reference to it. In other words, the only other testamentary gift of the mahal, in the events which have happened, is in favour of persons unascertainable up to the moment of the appellant's death. There can under the will be no vested interest in remainder or otherwise so long as she lives. The significance of these things or of some of them in their relation to the provisions of the Act of 1900, never unimportant, may here prove to be decisive.

The purpose of that Act is not doubtful. By the Act of 1869 taluqdars in the position of the testator here were deemed to have acquired a permanent heritable and transferable right in their estates. Every such taluqdar was thereby made competent to transfer during his lifetime by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of his estates. The order of succession to his estate, on his death intestate, is, with himself as the stock of descent, laid down in s. 22 of the Act.

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Now, in conferring this unrestricted power of testamentary disposition, the Act of 1869 had given effect to a policy not universally approved. The Act of 1900 to some extent revised or retraced that policy. Its purpose is set forth in the preamble. It had been found expedient "to make better provision for the preservation of certain estates and other immovable property in Oudh." The Act, however, is facultative and permissive only. It does not become operative *proprio vigore*. It merely empowers (inter alios) any owner in the position of the testator here to make to Government, notwithstanding any enactment to the contrary, the application which, with reference to Mahal Bhinga, this testator did submit, and it provides that, as a result of the registration of the declaration which this testator did make, the property included in the declaration becomes a settled estate subject to the provisions of the Act. And the testator's declaration here having been expressed to be irrevocable, Mahal Bhinga, under the Act, became a settled estate for all time, unless for some such default of its owner, as is referred to in s. 11, the estate is hereafter excluded from the Act by the action of Government.

In marked contrast with the powers of the Raja under the Act of 1869 were his powers over the estate after it had become subject to the provisions of the Act of 1900. No alienation for any greater or larger interest or time than during his life was valid. No part of the estate nor of its profits might be held to be or have been vested in him as its owner for any larger or greater interest in time than for his life and subject to the provisions of the Act.

But nearly as it approached thereto, it would not be correct to say that under the Act of 1900 the interest of the Raja in the mahal became no more than a mere life interest of convention. By "the provisions of the Act" just referred to there were attached to it as inherent characteristics two incidents appropriate rather to an estate of inheritance than to an estate for life. By s. 16 of the Act the Rajah, as holder in possession of a settled estate, had vested in him the power to grant leases of the mahal or any part of it for a term not

exceeding seven years, and with the consent of the Collector for a term not exceeding fourteen years. The provisions of sub-ss. 2 and 3 of the same section, inserted clearly for the protection of the successor in interest of the holder in possession of a settled estate show, as their Lordships think, plainly enough, that this leasing power is by the Act attached as an incident to the estate of such a holder for the public benefit and in the general interest, and is one to be respected as such. And the second incident attached by the Act to his estate which distinguishes it from a mere life interest is that, as will be seen in a moment, on his death intestate the settled estate, with an exception which would not extend to the appellant, descends, as under s. 22 of the Act of 1869, from each successive owner as a fresh stock descent. In truth the interest of an owner of a settled estate is not strictly under the Act either an estate for life or an estate of inheritance. It is a statutory estate which in its incidents partakes of the nature of both.

This brings their Lordships to the section of the Act which deals with the devolution and so called bequests of settled estates. Upon this section depends the validity or otherwise of the devise of Mahal Bhinga in favour of the appellant already analyzed. The section is as follows:—

“18.—(1.) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate, being a male, or being a female who, under the ordinary law to which persons of her religion and tribe are subject, would constitute a fresh stock of descent if she succeeded to the estate on an intestacy otherwise than as a widow, shall constitute a fresh stock of descent for the purposes of s. 22 of the Oudh Estates Act, 1869, and on the death of such person intestate the settled estate shall descend according to the provisions of that section.

“(2.) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate who constitutes a fresh stock of descent according to sub-section (1.) shall be competent to

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bequeath the same subject to the provisions of the Oudh Estates Act, 1869 :

“Provided that such person shall not be competent to bequeath the same except as an imparible estate to be held by one person only, and according to the provisions of this Act, or to subject the same or the profits thereof to any demand charge or incumbrance whatsoever, or to bequeath the same to a stranger so as to exclude from succession any person belonging to any of the classes specified in s. 22 of the Oudh Estate Act, 1869.”

Now, as might have been expected, if their Lordships, in their exposition of the Act, have correctly interpreted its scope and purpose, this power of bequest is very strictly limited. The owner of a settled estate thereby constituted a fresh stock of descent is not to be permitted by his will to invade that part of the scheme of the Act which has been enacted in the general interest. Clearly enough he is by this section given power by his will to select as his successor to the settled estate any person, tracing through himself, who belongs to any of the classes specified in s. 22 of the Act of 1869. He may make the last of these first if he be so minded.

But may he do anything more, and, if so, to what extent and in what way? The answer to these questions is beset by doubts of varying intensity. Take, for example, the will of this testator. The first devise of Mahal Bhinga, which in the event took effect, was to his widow for her life. Even under the section the widow did not thereby become a fresh stock of descent. In these circumstances had the testator by that gift exhausted his testamentary power of disposition? It was the opinion of the learned trial judge that he had. Not only was the bequest in favour of the appellant bad for that reason: the gift over, even if it had been expressed to take effect on the death of the widow and if there had been no gift to the appellant, would, in his view, have been, as such, bad also. This aspect of the matter is not discussed by the Court of first appeal. And their Lordships also will leave a question so important

undetermined until the necessity for deciding it arises.
But, as a question, it remains.

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The present case, however, regardless of it, can in their view be better determined by bringing the validity of the devise in favour of the appellant to the tests set by the proviso contained in the final paragraph of the section. Taking these proviso in their order, their Lordships inquire, first, whether the devise of the mahal to the appellant made by the testator is a devise of the estate to be held by her "according to the provisions of [the] Act." And in their view the answer must be in the negative. Even had the appellant been a person within any of the classes specified in s. 22 of the Act of 1869—as to this in a moment—a devise to her which did not carry with it the leasing power already described, and which, by its terms, prevented her from becoming a fresh stock of descent, was not, for reasons already given, a devise of an estate to be held by her according to the provisions of the Act. It is a devise of a bare life interest shorn of the incidents attached, for the public benefit, to the statutory estate created by the Act. As such, it is a devise prohibited by this proviso.

But having so far found, it would in the ordinary case be the duty of a Court of construction or administration to inquire whether within the limits of the law the manifest intentions of the testator in favour of the appellant could not be given effect to albeit indirectly. In the present case the obvious way of giving them effect would be for the Court to say that the interest given to the appellant might be treated as a gift to her for her life of the rents and profits of the estate charged upon that estate in the hands of the first respondent, upon whom, as the testator's heir at law, the estate had devolved as an estate undisposed of during the life of the appellant. If not also prohibited by the Act such a determination by a Court of construction or administration would, in this case, be quite in accordance with principle. But, unfortunately for the appellant, the gift to her now becomes one which subjects the estate or the profits thereof to a demand charge or incumbrance in her favour and, as

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such, it is a gift made unlawful or ineffective by the second proviso in the section. Accordingly the appellant's gift is defeated, whether it be tested by the requirements either of the first or of the second proviso.

But in the Court of first appeal and before the Board the invalidity of the gift was rested mainly on the provisions of the third proviso, and their Lordships in deference to the judgment appealed from and to the arguments of counsel before them feel that they ought not to close this judgment without some consideration of the appellant's position under that proviso. With reference to it, the appellant no longer contends that she is not a "stranger" within the meaning of that word as there used; she is not, in relation to the testator, within any of the classes specified in s. 22 of the Act of 1869; she is not, under any other right, entitled to inherit, *ab intestato*, any property of the testator; she is therefore a "stranger." And upon this footing it was held in the Court of first appeal, and the view was pressed upon the Board by learned counsel for the first respondent, that the devise to her was, for that reason alone, invalid; the concluding words of the proviso, "so as to exclude from succession any person belonging to any of the classes specified in s. 22 of the Oudh Estates Act, 1869," being merely expository of the meaning to be attributed to the word "stranger." On the other hand, it was strongly contended by learned counsel for the appellant that the proviso cannot be so read. Its words in this respect are, he urged, too plain to admit of any construction save this, that a devise to a stranger is not thereby prohibited unless its effect is within the true meaning of the words to "exclude from succession," putting it shortly, any of the testator's kindred. And it was contended that the gift in favour of the appellant, while it might delay the enjoyment of the estate by some one of the testator's kindred, did not and could not "exclude" such kindred "from succession" altogether.

Now, their Lordships are impressed by the difficulties which beset both contentions. They feel first of all that the words are not strong enough to prevent a valid devise of the

estate being made to a "stranger" in any circumstances whatever. If, for instance, a testator was so unusually circumstanced that he left behind him no person belonging to any of the specified classes, their Lordships can see nothing which, under the proviso, would affect in such a case the validity of a devise to a stranger otherwise unimpeachable. To them it does not seem permissible as a mere matter of construction to treat the concluding words of the proviso as being no more than a definition of the word "stranger." On the other hand, they have a difficulty in interpreting the word "exclude" so narrowly as does the appellant. If the question really arose in this case the question whether that word ought or ought not to have a generous or a narrow signification attributed to it would demand at their hand very serious consideration indeed. But the question does not arise now and, for a reason now to be stated, it can rarely if ever arise. If, as their Lordships have in effect held, a devise to a stranger, to escape destruction under the first proviso, must be a devise which constituted the "stranger" a fresh stock of descent, then such a bequest necessarily excludes, as such, and in the strictest sense, every person who traces his claim from the testator, under s. 22. In other words, except in the possible case of the stranger being a female who "under the ordinary law to which persons of her religion and tribe are subject would" [not] "constitute a fresh stock of descent if she succeeded to the estate on an intestacy," a devise to a stranger otherwise valid necessarily excludes the testator's kindred and can only be valid if there are none to be excluded. In truth, the invalidity of this devise under the first proviso so destroys it that the application to the devise of the third proviso never arises.

On the whole case, in the result, their Lordships are of opinion that the decree of the Court of first appeal should remain undisturbed, and they will humbly advise His Majesty that this appeal therefrom should be dismissed, and with costs.

Solicitors for appellant: *Douglas Grant & Dold.*

Solicitors for respondents: *T.L. Wilson & Co.*

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 Feb. 26. MAULVI MISBAH-UD-DIN (DEFENDANT). RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

Principal and Agent—Money entrusted to Agent—Suit for Account—Agent setting up Right of third Person.

An agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute his principal's title, unless he proves a better title in a third person and that he is defending on behalf, and with the authority, of that third person.

Decree of the High Court reversed.

APPEAL from a decree of the High Court (July 9, 1925) reversing decrees of the first class Subordinate Judge of Delhi (December 15, 1922, and April 30, 1923).

The appellant brought a suit against the respondent claiming an account as to two sums of Rs. 5000 and Rs. 12,250 entrusted to the respondent as his kamdar (agent) in August, 1918, and January, 1919, respectively. The respondent by his written statement did not admit that he was the appellant's kamdar, but so admitted in his evidence at the trial. His case in defence appears from the judgment of the Judicial Committee.

The Subordinate Judge made a preliminary decree for accounts; on the defendant failing to lodge any accounts, he made a final decree for Rs. 12,250, the plaintiff having agreed that the defendant had spent the whole of the first item of Rs. 5000 in his service.

The High Court (Martineau and Zafar Ali JJ.), on grounds which appear from the present judgment, reversed the decrees.

1929. Feb. 5. *E. B. Raikes* for the appellant. It was not established that the appellant had been deposed from being rais, or from the control of the State funds. If he was so deposed it was after the money had been entrusted to the respondent. But in any case the respondent, who admitted

* Present: LORD SHAW, LORD ATKIN, and SIR LANCELOT SANDERSON.

that he had been the appellant's agent, was bound to account. It is well settled that an agent or bailee cannot deny his principal's title: Smith's *Leading Cases*, 12th ed., vol. ii., p. 883, and cases there cited. Although the Indian Contract Act, 1872, does not specifically so provide, there is nothing in it inconsistent with the above well settled principle. The Act is not an exhaustive code as to the matters with which it deals: *Irrawaddy Flotilla Co. v. Bugwandas*. (1)

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The respondent did not appear.

Feb. 26. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decree of the High Court at Lahore who reversed two decrees of the Subordinate Judge of Delhi in a suit brought by the plaintiff against the defendant, claiming an account of moneys entrusted to the defendant as agent, and payment of the amount found due. The plaintiff at the time of the transactions in question was the rais or chief of the State of Sheopur-Baroda. In August, 1918, he entrusted the defendant as his agent with the sum of Rs. 5000, and in January, 1919, with the sum of Rs. 12,250 to be applied for the purposes of the plaintiff. The receipt of these sums is admitted. It has been found that the defendant has not accounted for the greater part of the sums so received.

The defendant, however, has relied on a plea that the money he received was State money: and that the plaintiff had no right to sue, because in January, 1919, he was deposed from his position as rais or chief by the authorities of the State of Gwalior. What the precise relations are between Sheopur-Baroda and Gwalior is a matter which their Lordships deem unnecessary to consider in this case. It appears that up to January 19, 1919, the plaintiff was in possession of the revenues of Sheopur, and controlled their administration. There was some dispute at the hearing whether the money entrusted to the defendant was entrusted to him for public purposes or private purposes of the plaintiff: whether it came from the public revenue or from the private

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purse of the plaintiff. The Subordinate Judge appears to have inclined to the view that it was a private transaction: the High Court held that it concerned public money. In January, the authorities of the State of Gwalior were apparently dissatisfied with the plaintiff's administration: and sent to Baroda a superintendent, to control the collection and administration of the revenue. The superintendent appeared with sufficient force to execute his orders, and thenceforward the control of the revenues of the State appears to have passed from the plaintiff to the superintendent. No question arises at all in this case as to the validity of these proceedings. The High Court find that the plaintiff was deposed. If this finding were material their Lordships can discover no evidence to support it. The evidence of the plaintiff's witnesses is to the contrary, while the defendant admitted that the plaintiff is still entitled rais and that all ceremonial functions are performed by him. Finding, however, that the money belonged to the State and that the plaintiff had been deposed before the institution of the suit and had been divested of all control over the State treasury, the learned judges of the High Court find that he had no locus standi to recover the amount due.

Even assuming the correctness of the premises their Lordships consider the conclusions incorrect. The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee, which may come into existence without the added relation of principal and agent. The agent is certainly in no better position than the bare bailee. It may also be remarked that as between principal and agent there is a contractual position fortified by fiduciary relations, and that one of the contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to him in the course of the mandate. It is difficult to see how this obligation can in any way disappear

except by transfer of the contractual right by novation or operation of law: and it may well subsist, notwithstanding that the property proves to belong to some one other than the principal.

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In the present case, however, it is unnecessary to distinguish between the right to have an account, and the right to receive the balance found to be in the agent's hands. The agency is admitted: the defendant does not suggest that he is defending for or with the authority of the State of Gwalior. He must therefore account to his principal, and leave him to settle his affairs with Gwalior if there is anything to settle. But in this particular case the defendant entirely fails to prove that Gwalior makes any claim to the money, or alleges that there has been any divesting of the plaintiff of his rights contractual or otherwise; indeed, it is quite consistent with the evidence that Gwalior acquiesces in the plaintiff's dealings with State money before the date at which intervention of the superintendent took place. The learned Subordinate Judge, in their Lordships' opinion, came to a correct conclusion: he made a preliminary decree that the defendant should account, and after a lapse of some months during which the defendant had failed in spite of opportunity to render any account, he made a decree for the amount claimed, less Rs. 5000 which the plaintiff was willing to treat as expended on his account.

Their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside with costs here and below, and that the decree of the Subordinate Judge should be restored: and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T.L. Wilson & Co.*

J. C.* JWALADUTT R. PILLANI (DEFENDANT) APPELLANT;
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 Feb. 28. BANSILAL MOTILAL (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Partnership—Dissolution—Notice of Dissolution—Retired Partner—Liability to old Customers—Indian Contract Act (IX. of 1872), s. 264.

When after a dissolution of partnership the business is continued in the same firm name, a partner who has retired at the dissolution is liable upon a contract made by the new firm with a person who has previously dealt with the old firm unless that person has received notice of the dissolution, even though public notice by advertisement has been given.

The above rule of English partnership law having been recognized in India before the Indian Contract Act, 1872, the provisions of s. 264 of that Act cannot be held to provide otherwise merely by implication, especially as decisions in India dating from 1882 have decided that it has not that effect.

Chundee Churn Dutt v. Eduljee Cowasjee Bijnee, I.L.R. 8 Cal. 678 approved.

Although the Indian Contract Act, 1872, deals with partnership in a separate chapter, its provisions are not exhaustive of the law upon that subject.

Irrawaddy Flotilla Co. v. Bugwandas, L. R. 18 I. A. 121 applied. Decree of the High Court affirmed.

APPEAL (No. 154 of 1927) from a decree of the High Court in its Appellate Jurisdiction (March 29, 1927) affirming a decree of the Court in its Original Jurisdiction (August 26, 1926).

The question upon the appeal was whether the appellant was liable upon a promissory note drawn in favour of the respondent by a partnership firm in which the appellant at the date of the note had ceased to be a partner. The promissory note was in discharge of one drawn before the dissolution. The respondent was found not to have had notice of the dissolution, though public notice by advertisement had been given.

The facts appear from the judgment of the Judicial Committee.

The Appellate Court, affirming Taleyarkhan J., held the appellant liable. The learned Judges (Martin C. J. and

* Present: Viscount DUNEDIN, LORD CARSON, and SIR CHARLES SARGANT.

Blackwell J.) were of opinion that the case being on the original side English law applied in the absence of Indian legislation, and that under that law old customers of a firm were not affected by a dissolution of which they had no notice. In their view s. 264 of the Indian Contract Act, 1872, which did not apply in terms, did not apply by inference.

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1929. Feb. 11, 12. W. A. Greene K.C. and E. B. Raikes for the appellant. The Indian Contract Act, 1872, deals exhaustively with the subject of partnership: *Mohori v. Dhurmodas Ghose* (1); *Ramdas Vithaldas v. S. Amerchand & Co.* (2); *Narendra Nath Sircar v. Kamalabasini Dasi*. (3)

Sect. 264 draws no distinction between old customers and new customers, and by implication provides that public notice of a dissolution shall affect all persons dealing with the firm. It is conceded that under the law of England the appellant would have been liable. *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (4) was wrongly decided. [Reference was made also to *Ezekiel Moses v. Russa Engineering Works, Ltd.* (5); *Jagat Chandra Bhattacharjee v. Gunny Hajee Ahmad*. (6).]

Upjohn K. C., De Gruyther K. C., Sir George Lowndes K.C. and Sir Cassic Holden for the respondent. Even where a subject is dealt with in a separate chapter of the Contract Act, the Act is not exhaustive of the subject: *Irrawaddy Flotilla Co. v. Bugwandas*. (7) The cases relied on for the appellant decided only that the Act is exhaustive in matters with which it expressly deals. The Act does not by s. 264 and 265 cover all questions arising in a dissolution. It is clear that in England old customers are entitled to specific notice of a dissolution: *In re Hodgson* (8); *Scarf v. Jardine*. (9) That view had been adopted in India before the Act of 1872: *Shewram v. Rohomutoollah*. (10) Had it been intended to

(1) (1900) L.R. 30 I. A. 114, 125.

(6) (1925) I.L.R. 53 C. 214.

(2) (1916) L.R. 43 I.A. 164, 170.

(7) (1891) L.R. 18 I.A. 121, 129.

(3) (1896) L.R. 23 I.A. 18 26.

(8) (1885) 31 Ch. D. 177, 184.

(4) (1882) I.L.R. 8 C. 678.

(9) (1882) 7 App. Cas. 345, 349.

(5) (1913) I.L.R. 1 R. 47.

(10) (1864) S. H. C. R. 94.

J. C. provide otherwise in 1872 it would have been done in clear
 1929 and express terms. The English rule is based upon holding
 out or estopped by representation, which principle is enacted
 JWALADUTT by s. 115 of the Act. In 1882 the High Court at Calcutta in
 R. PILLANI *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (1) held that
 v. BANSILAL specific notice was required in the case of old customers and
 MOTILAL that decision has since been followed in India. That course
 of decisions should not now be interfered with, seeing that
 s. 264 does not expressly provide otherwise.

Greene K.C. in reply referred to Pollock and Mulla's Indian Contract Act, p. 803.

Feb. 28. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. The facts in this case are not in dispute. The appellant Pillani was a partner of a firm of Husseinbhai Pillani Wadia & Co. On April 3, 1923, that firm along with Wadia Woollen Mills, Ld., granted in respect of a loan on a promissory note for 2 laes of rupees with interest at 7 $\frac{3}{4}$ per cent. in favour of the respondent Raja Bahadur Bansilal Motilal. On September 12, 1923, the firm dissolved partnership and the appellant retired. The firm continued to do business under the same name and by the deed of dissolution a certain interest in the business was secured to the appellant though he was no longer a partner.

On April 3, 1924, the old promissory note was cancelled and a new promissory note given by the company and the firm for the same sum of 2 laes, interest on this note running at 8 $\frac{1}{4}$ d. per cent. It is admitted that the retirement of the appellant from the firm was advertised in the "Bombay Gazette" and in four other newspapers, and it was found by the trial judge and has not since been questioned that no intimation was sent or conveyed in any way to the respondent. The sole question is whether the appellant is liable on the second promissory note. He has been so found by the judge of first instance and by the Court of Appeal. There can be no question that the plaintiff, being an old customer and no

notice having been given to him of the dissolution of the partnership and the retirement of the appellant, the appellant is by English law liable. It would be otiose to quote authority for this, and this was undoubtedly the law of India, at least prior to the Contract Act of 1872: *Sheicram v. Rohomutoollah*. (1)

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The defence of the appellant is based on the terms of s. 264 of the Indian Contract Act of 1872, which is as follows: "Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given unless they themselves had notice of such dissolution."

The appellant argues that "persons" includes both old and new customers, and that though the section is expressed in a negative form there must be extracted therefrom the positive proposition that persons will be affected by a dissolution of which public notice has been given. Against that it is urged that the section is merely negative and must be strictly limited to what it says, which is the effect of the dissolution of the firm on the rights of persons dealing with it, but not on the liabilities of the firm to the persons so dealing.

Their Lordships feel that if this were a new statute which was to be construed for the first time, there would be great force in the appellant's argument. But the matter cannot be so approached. As long ago as 1882 the very question was raised before the High Court of Calcutta in the case of *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (2), and Garth C. J. pronounced a judgment contrary to the contention of the appellant. He was chiefly swayed by the consideration that if it was intended to make such a far-reaching change on what had been the law of England introduced into the law of India, and which was still the law of England, the enactment would have been expressed in clear and positive words and not left to be gathered by inference from a negative proposition. That judgment has been followed in subsequent cases, and has ruled the law and contracts in India ever since. To the view of Garth C. J. their

(1) (1864) Suth W.R. 94.

(2) I.L.R. 8 C. 678.

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Lordships would add two further considerations. The law as laid down in England has been all along found a workable law in a country where there is far more commercial experience than in India, and it remained unaltered in England when the whole subject was reviewed in the Partnership Act of 1890.

Also the Indian Contract Act is not a code. The preamble so states: "Whereas it is expedient to define and amend certain parts of the law relating to contract"; and Lord Macnaghten in the case of *Irrawaddy Flotilla Co. v. Bugwandas* (1): "The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts." And although the section does occur in a fasciculus of sections devoted to partnership, it is clear that the fasciculus is not exhaustive of all questions which can be raised in connection with partnership.

Taking into account all these considerations their Lordships do not think they would be justified, in view of the ambiguity of the expression used, to give effect to a view which would upset what has been considered by the commercial community as the law for such a long period. They will, therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellant: *Lattey & Dawe*.

Solicitors for respondent: *T.L. Wilson & Co.*

(1) L. R. 18 I. A. 121, 129.

RAJA RESHEE CASE LAW (PLAINTIFF). APPELLANT;

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AND

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SATIS CHANDRA PAL AND ANOTHER

(DEFENDANTS) RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Bengal Tenancy Act (VII. of 1885), ss. 105, 106, 109—Civil Suit after application to Revenue Court—Application withdrawn by Leave—Whether Suit maintainable.

Sect. 109 of the Bengal Tenancy Act, 1885, prohibits a civil suit in any matter which is or has been the subject of an application under s. 105 to s. 108, even if the application has been withdrawn, whether with or without the leave of the Court.

Purna Chandra Chatterjee v. Narendra Nath Chowdhury (1925) I.L.R. 52 C. 894 (F.B.) approved.

Decrees of the High Court affirmed.

CONSOLIDATED APPEAL (No. 16 of 1928) from two decrees of the High Court (January 26, 1926) affirming two decrees of the Subordinate Judge of Midnapore.

The appellant brought two suits in the Civil Court alleging that the record of rights of certain villages published in 1916 recorded that his tenant, the first respondent-defendant, was in possession of a greater area than that included in two pottahs granted to him; the plaintiff claimed possession of the excess area with mesne profits, or alternatively that the rent should be fixed. As to the tenancy in the first case, he had previously made applications to the Revenue Courts under the Bengal Tenancy Act, 1885, s. 105, for the settlement of rent of the excess area, and under s. 106 for a decision of the dispute so arising on the entry in the record. All three applications had been withdrawn, two by the express leave of the Court. With regard to the other tenancy, there had been an application under s. 105 and an application under s. 106; one was allowed to be withdrawn and the other was dismissed for default in payment of the Court fees.

*Present: LORD CARSON, LORD ATKIN, and LORD SALVESEN.

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The High Court, affirming decrees of the trial judge, dismissed the suits. The learned judges (Chatterjea A.C.J. and Page J.) held upon the authority of the Full Bench in *Purna Chandra Chatterjee v. Narendra Nath Chowdhury* (1) that having regard to the previous applications, s. 109 of the Bengal Tenancy Act, 1885, prevented the suits from being maintained, whether the applications were or were not withdrawn.

1929. Feb. 21. *De Gruyther K.C.* and *Dube* for the appellant. Sect. 109 does not apply when the previous application has been withdrawn, at any rate, if it is withdrawn with leave to bring a fresh suit. The section applies only if a decision of the Revenue Court has been given, or is in course of being given. By s. 107 the Code of Civil Procedure applies, and consequently Order xxiii., r. 1, which enables a plaintiff to withdraw his suit and empowers the Court to give him leave to bring a fresh suit. Sect. 109 of the Act of 1885 in effect merely reproduces ss. 10, 11 of the Code. The decision in *Purna Chandra Chatterjee v. Narendra Nath Chowdhury* (1) was erroneous.

Graham-Dixon, for the first respondent, was not called upon.

March 5. The judgment of their Lordships was delivered by

LORD SALVESEN. These appeals have been brought to settle a question which has been frequently discussed before Indian tribunals and has resulted in conflicting decisions. So far as India is concerned the law was finally settled by a decision of the Full Bench of the High Court of Bengal, *Purna Chandra Chatterjee v. Narendra Nath Chowdhury*. (1) In the present case the judgment followed the decision of the Full Bench, and the object of the present appeals is in effect, to bring that decision under review.

As the facts are not in controversy it is unnecessary to recapitulate the summary of these contained in the judgment appealed from. It is sufficient to say that the appellant, who

is the owner of a large area of ground, of which the first respondent (who alone appeared before the Board) holds a lease, and presented three applications in the Court of the Revenue Officer, one under s. 106 and two under s. 105 of the Bengal Tenancy Act, 1885. The latter were withdrawn without any express leave being granted to bring a fresh suit, while in the former such permission was granted. Thereafter, the present suits (two) were filed by the appellant in the Court of the Subordinate Judge of Midnapore, dealing admittedly with the same subject matter as was contained in the previous applications in the Court of the Revenue Officer.

The respondents pleaded that the suits were barred under s. 109 of the Bengal Tenancy Act and this plea has been sustained in all the Courts below.

Sect. 109 is in these terms: "Subject to the provisions of s. 109A a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under ss. 105 to 108 (both inclusive)."

The argument for the appellant which had the support of Suhrawardy J. in the Full Bench case cited was that when a suit is allowed to be withdrawn with leave to bring a fresh suit, it should be regarded as never brought, and that the same result should be reached in the case where a suit is simply withdrawn before evidence has been heard although no permission has been asked or granted by the Court of the Revenue Officer to institute a fresh suit in a Civil Court. This argument did not commend itself either to the judges who decided the present case or to the other members of the Full Bench. Walmsley J. said: "In my opinion it is the making of the application that brings into play the prohibition of S. 109 and the answer that I would give to the reference is to that effect—namely, that if an application is made under s. 105, of the Bengal Tenancy Act and subsequently withdrawn whether with or without the permission of the Court, a suit on the same subject matter is barred by the provisions of s. 109 of the Tenancy Act."

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Their Lordships are in entire agreement with this view. They think that the language of the section admits of no other construction, and that such an exception as the appellant contends for cannot be implied. The policy of s. 109 of the Act is to prevent multiplication of procedures by enacting that where an application is made in one or other of the competent Courts it shall be prosecuted in that Court and in no other.

They will therefore humbly advise His Majesty that the appeals should be dismissed with costs to the respondent who appeared.

Solicitors for appellant: *Watkins & Hunter.*

Solicitor for respondents: *H.S.L. Polak.*

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E K R A D E S H W A R I B A H U A S I N

(PLAINTIFF) APPELLANT;
AND

HOMESHWAR SINGH AND OTHERS

(DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Hindu Law—Widow's Maintenance—Arrears of Maintenance—Widow residing in parental Home.

A Hindu widow who has left the residence of her deceased husband, not for unchaste purposes, and resides with her father is entitled to maintenance, also to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence.

The maintenance should be such an amount as will enable the widow to live, consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house, unless there are circumstances which affected, one way or the other, her mode of living there.

The Judicial Committee is extremely reluctant to interfere with the amount of a decree for maintenance unless there has been some miscarriage in the way the amount has been arrived at.

Pirthee Singh v. Raj Kower (1873) L.R.I.A. Supp. 203 followed.

Decree of the High Court modified.

*Present : LORD SHAW, LORD DARLING, and SIR LANCELOT SANDERSON.

APPEAL (No. 128 of 1927) from a decree of the High Court (May 13, 1926) affirming a decree of the Subordinate Judge of Darbhanga (March 10, 1924).

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The appellant, a Hindu widow, whose husband died in 1917, brought the present suit on April 22, 1922, claiming maintenance with arrears. She had continued to reside in the ancestral house of her deceased husband until towards the end of 1921, and had since resided with her father.

The facts appear from the judgment.

The trial judge made a decree for Rs.350 per month from the date of his decree. The plaintiff appealed, and the defendants filed cross-objections. The High Court (Das and Adami JJ.) affirmed the decree.

1929. Feb. 8. *De Gruyther K. C.* and *Dube* for the appellant.

Dunne K.C. and *S. Hyam* for the respondents.

March 5. The judgment of their Lordships was delivered by LORD SHAW. This is an appeal from a judgment and decree dated May 13, 1926, of the High Court of Judicature at Patna, which affirmed a judgment and decree of the Subordinate Judge of Darbhanga dated March 10, 1924.

The appellant is the widow of Babu Ekradesswar Singh, a descendant in the junior line of the Darbhanga family. Babu Ekradesswar was twice married. He died on October 21, 1916, survived by the appellant, his second wife, and a daughter by her, and by the respondents 1, 2 and 3, his sons by his first wife, who had predeceased him. He was also survived by respondents 4 and 5, his grandsons, who were the sons of respondent No. 2.

The appellant, Ekradesswari, who was sole widow continued to live in the family house for four or five years after her husband's death. She complains in this action that the style of life to which she had to submit during that residence was penurious and inadequate. Upon leaving her husband's house she went to stay with her father with whom she still lives.

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In the year 1917 a suit was instituted by the respondent No. 1 against the respondent No. 2 for partition of the estate left by their father and a compromise was arrived at. The position of the family had been brought before the Court of the Subordinate Judge at Bhagalpur with a view to having the maintenance of the appellant fixed. The judge's order of February 23, 1918, decreeing a partition, states that a petition by the parties as to the maintenance of their stepmother could not be dealt with judicially, as she did not appear, though requested to do so. It may be doubtful whether the appellant was fully apprised of, or understood, these proceedings, and it is clear that no maintenance was either asked for by her or fixed for her in that suit, and that she continued her residence and maintenance as before. She, however, as already mentioned, did ultimately leave the family house, and took up her abode with her father, who maintains this daughter in his household with the rest of his family.

The property thus partitioned was heavily incumbered with debts. There is no question however that it remained liable to the widow's claim for maintenance. Shortly after taking up residence with her father the appellant raised this suit.

In view of the ascertained facts of the case the demands made in the suit were of an unusually serious character. A maintenance allowance was asked at the rate of Rs. 18,000 per annum. Arrears of maintenance were asked from the date of her husband's death, amounting to Rs. 99,000. A further sum of Rs. 15,000 was demanded for the cost of building a house for her separate use and occupation. Finally, a demand was made for Rs. 13,170, the price of jewellery and ornaments contained in a list which was appended to the plaint. These were alleged to have belonged to the plaintiff and to be wrongfully detained by the defendants.

In the course of the proceedings the case as to the last item entirely failed. Both Courts agreed that it had not been made out in fact. They further agreed that the separate item for the cost of building a separate house for herself failed.

There remain, however, the important claims as to maintenance, and these are the questions which alone were submitted to the Board upon appeal, the points being, first, as to the amount of maintenance allowance, and, secondly, as to arrears, that is to say, the date from which the allowance should run. As to the amount of the allowance there are certain concurrent findings of the Courts below. The Subordinate Judge found that the gross income of the estate was Rs. 150,000 per annum, and that the net income was Rs. 33,000 per annum. Both of these findings were concurred in in fact by the High Court. One of the debit items was Rs. 66,000 due under mortgage to the Maharaja of Darbhanga. It appears clear that this mortgage originated in debts contracted very largely in the time of the appellant's husband. The subject of that item is, however, a matter of litigation between the respondents and the Maharaja of Darbhanga. Should that litigation end successfully, that is to say, in favour of the estate now in question, arrangements by consent are made in the decree of the High Court for reconsideration of the amount of maintenance allowance in respect of the estate being thus incremented, without filing a fresh suit. Their Lordships approve of the matter being thus dealt with by the High Court. In the view of the Board this treatment of the position is sound in principle and advantageous in procedure.

Their Lordships accordingly see no reason in the case for interfering with the statement of the net income arrived at below. It is Rs. 33,000. The demand of the appellant for a maintenance allowance of no less than Rs. 18,000 seems thus entirely unreasonable. An attempt to execute it was made by a reference to an allowance made a good many years ago (in the lifetime of Rajeshwari Bahuasin) to the wife of Janeshwar Singh. It may or may not be possible to interfere with that allowance, but it itself constitutes a severe burden upon the estate in its now impoverished condition, and it forms no precedent either in fact or in law for the present claim of the appellant.

The second argument was that upon an investigation of the figures in the previous litigation just referred to the

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J. C. sum of Rs. 15,000 appeared to bear the relation of one-fourth
 1929 to the then net income, and this was suggested as a principle
 EKRADESH- of law to be now applied. Their Lordships must definitely
 WARI negative such a suggestion. It is no part of the maintenance
 BAHUASIN law of India. In some cases, if applied, it would enlarge
 v. the allowance made far beyond any reasonable conception of
 HOMESHWAR maintenance as such. In other cases it might depress the
 SINGH. allowance beyond what was a reasonable maintenance item.

The ground, however, for attack upon the concurrent findings of the Courts below, is said to be some error of legal principle, and (somewhat inconsistently with this) it was complained that it was difficult to find any legal principle upon which the maintenance allowance had been fixed. Upon this last their Lordships observe that it may be so, for the simple reason that maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of law in arriving at a fixed sum.

The discretion exercised in making this induction when agreed to by two Indian Courts or even by one, should not be lightly interfered with. As observed by Sir Montague Smith in the case of *Sreemutty Nittokissoree Dossee v. Jogandro Nauth Mullick* (1): "Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at."

Their Lordships, however, do not wish to leave this part of the case as having been decided on grounds which are barren of principle. The Courts below fixed the maintenance allowance of the appellant at Rs. 4200 per annum, and the learned Subordinate Judge in doing so, says this: "This sum, I think, would enable the lady to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime." That is as near to principle as can be got in such cases and, with the addition to be presently noted, their Lordships entirely approve of that view. The addition is this: that there may be circumstances in which the past mode of life of the widow has been demonstrably on a penurious and miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of the husband. But if, as may be readily assumed, in such a case as the present, the scale was suited to his own position in life, that is a sound point from which to start the estimate. In the view of the Board the estimate made as applicable to present circumstances in this family should not be interfered with.

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Up to this point in the discussion the appeal fails.

There is, however, a further point in the case—namely, arrears, in other words, the date from which a maintenance allowance should start. There are four possible periods—namely, first from the death of the deceased husband (October 21, 1916), that is to say, even during the residence on the alleged limited style of life in his former establishment; second, from the date of the change of the appellant to her father's residence, a period which is variously stated as from the end of 1920, to the end of 1921. To this variation subsequent reference will be made. Third, from the date of suit, namely, April 23, 1922, and fourth, from the date of decree, namely, March 10, 1924.

Their Lordships are clearly of opinion that to start the maintenance at the last mentioned date, as has been done in the Court below, would be an inadequate recognition of the widow's right to maintenance. It is indeed an inversion

J. C. of the correct procedure in the case of a continuing right.
 1929 In any view the right could not be post-dated from the institution of the suit onwards. This, besides being erroneous in law, would be a daily temptation to delay in litigation by postponing the date of liability to that of final decree.

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Payment from the date of suit being thus granted the question is whether arrears prior to that date are exigible. In the Board's opinion such arrears, if they truly exist, fall within the range of the widow's right to maintenance. When a widow's receipt of maintenance in residence in her husband's establishment ceases contemporaneously with her institution of a suit for maintenance the point almost settles itself. When, however, as is the case here, there is no such exact concurrence of dates, it is the duty of the Court to consider the whole circumstances of the situation in pronouncing a decree for arrears.

In the present case the Court is met by a demand by the appellant of a somewhat peculiar kind. It is to the effect that a decree should include arrears of maintenance not only from the date when she left her late husband's house to reside with her father, as he has since done, but should date from her husband's death and include the time that she resided in her husband's establishment. The result of conceding this would be a kind of cross account: on the one side maintenance quantified in money as from the husband's death; on the other side a credit being given for maintenance as actually received with its incidental costs. In the opinion of the Board there is no legal justification for such a treatment of the case and the argument of the appellant fails. While their Lordships do not exclude an extreme case, say, of a widow being kept under circumstances of extreme penury and oppression, such a case must be treated as most exceptional, and would require unimpeachable proof. It is sufficient to say that nothing like that has been established in the present case.

On the other hand, the argument presented for the respondents, and, indeed, the decision of the High Court, seem to be based upon the assertion that it is the law of

India that a Hindu widow has in the ordinary case no right of maintenance if she chooses to change from her husband's residence and choose another for herself. With much respect to the learned judges the Board is unable to accept this view.

On the authorities it is, of course, true that if that change of residence is made for unchaste purposes it is a sufficient answer to the demand to offer her the shelter of the old home. But this is in no respect any such case. It is a simple case of a Hindu widow from motives which cannot be impeached on the ground stated, leaving her old residence and preferring the shelter and protection of her father's home. In the opinion of the Board such action was within her legal rights. She was only twenty-four years of age, and one cannot peruse the authorities or have a knowledge of Indian life, without understanding that such a change might be made from a sense of propriety and from the best of motives. But even so the point is not one of motives but of right.

It is now necessary to see what is the foundation of the judgment of the Court below. It is contained in a single sentence in the judgment of the High Court as follows: "In regard to her claim for arrears of maintenance we think that there is no ground for allowing that claim. It is not suggested that she has incurred any debts in maintaining herself and we can find no excuse for her leaving her sons and going to reside with her father."

With much respect to the High Court their Lordships think that a judgment in these terms contravenes the long and well settled law of India. It makes this case one of widespread importance, and the Board thinks it accordingly right to note the outstanding case law on the subject.

This is not an instance in which there was any direction in the husband's will that she was to be maintained in the family home. In such circumstances, that is to say in the ordinary case, it is no part of the duty of a widow choosing her own residence to furnish excuses which will satisfy a Court of law that she has made a judicious choice. The authorities on that subject are clear for at least three-quarters of a century, but only one or two need be cited.

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In 1854 Peel C.J., of Bengal, delivered an important and leading judgment, reported in the *Vyavastha-Darpana*, p. 362. That very learned judge states that the Court has examined closely into the state of the authorities and the law on the subject. He quotes from the case of *Ujjal-mani Dasi v. Joy-gopal Pal Choudhuri* (June 1, 1848) as follows: "It was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband; his brothers were young men, and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death, therefore, it appears quite clear from the answers given by the pandits that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them in order to put herself under her mother's protection."

He thereafter states the proposition thus, in the language of the pandits adopted by the Privy Council: "If a widow from any other cause but unchaste purposes ceased to reside in the husband's family and took up her abode in her parents' family her rights would not be forfeited." In a later passage in the same judgment he says: "We have examined the texts of the ancient law, and we think they bear out the opinions of the pandits in the case before the Privy Council. The texts say as to maintenance, forfeiture is incurred by unchaste life, but they do not say that it is incurred otherwise. There are many duties enjoined to women in the text of a moral or religious nature, the violation of which would never have involved any forfeiture. Forfeitures are not to be extended by construction. The duty to reside with the family of the deceased husband is not enjoined for the sake of thrift."

The decision was highly approved by this Board in *Rajah Pirthee Singh v. Ranee Raj Kower*.⁽¹⁾ In that case Sir Barnes Peacock again reviewed the authorities up to date, and concludes as follows: "It therefore appears that a Hindu widow is not bound to reside with the relatives of her husband;

(1) (1873) L. R. I. A. Supp. 203.

that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes." These principles have never been, gone back upon or modified. They are still the law of India.

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It remains accordingly only to fix the date from which the maintenance allowance should run. The appellant having remained in her late husband's home, and having as she had a right to, do, during that period accepted maintenance in fact and in kind, and she having thereafter, as was also within, her legal right, changed her residence and gone to live with her father, what was the date of that change? The evidence upon that subject is far from clear. It appears to be established that she left by the family car on a visit to her father to attend the sradh ceremonies of her deceased mother. When there she made up her mind to stay on, and she has done so ever since. The Board is of opinion that this happened in the end of 1921, and that accordingly maintenance on the scale fixed by the Court below should run not from the date of decree, as found by the High Court of Appeal, nor from the date of suit in April, 1922, but from January 1, 1922.

Their Lordships will humbly advise His Majesty that the decree appealed from be affirmed subject to the modification that the maintenance allowance be granted from January 1, 1922. There will be no costs in the appeal.

Solicitors for appellant: *Pugh & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

J. C. * SKINNER (PLAINTIFF) APPELLANT;
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March 19. NAUNIHAL SINGH (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Limitation—Mortgage—Reversioner's Suit to redeem—Transfer of Possession by Mortgagee—Indian Limitation Act (IX. of 1908), Sch. I., arts. 134, 140.

When a mortgagee has transferred possession of the mortgaged property for a valuable consideration a suit to redeem by a plaintiff who at the date when the mortgagee transferred possession had a contingent interest in remainder in the property is governed by art. 140 and not by art. 134 of the Indian Limitation Act, 1908, Sch. I.; the suit consequently is not barred if it is brought within twelve years from the date when the plaintiff's estate falls into possession, even though it is brought more than twelve years after the date of the transfer under which the defendant claims.

Decree of the High Court I.L.R. 47 A. 803 reversed.

APPEAL (No. 86 of 1927) from a decree of the High Court (March 27, 1925) reversing a decree of the Subordinate Judge of Mozaffarnagar (January 20, 1923).

The suit was brought by Alice Georgina Skinner to recover possession of five villages by redemption of a mortgage executed in 1863 by her father. The plaintiff had become entitled to the villages in 1919 under her father's will upon the successive deaths without issue of her three brothers. The defendant purchased the villages in 1904 from the Nawab of Rampur, to whom the mortgagees, acting as absolute owners, had mortgaged, and had subsequently sold them, in 1898 and 1903 respectively. The plaintiff died before the appeal to the High Court; the present appellant was her executor.

The facts appear fully from the judgment of the Judicial Committee.

The effect of the will of the plaintiff's father and the position as to mortgages created by him were dealt with by the Board in 1913 in *Skinner v. Naunihal Singh.* (1)

*Present: LORD CARSON, LORD ATKIN, and LORD SALVESEN.

(1) (1913) L.R. 40 I.A. 105.

The Subordinate Judge made a decree in favour of the plaintiff; he held that art. 140 of the Indian Limitation Act, 1908, Sch. I., applied, and that consequently the suit was not barred by adverse possession, as the defendant had pleaded.

Upon appeal to the High Court the defendant raised the contention that the suit was barred by art. 134. The learned judges (Lindsay and Kanhaiya Lal JJ.) held that that article applied, and that it controlled both art. 140 and art. 148; the appeal was therefore allowed and the suit dismissed. The appeal is reported at I.L.R. 47 A. 803.

1929. Feb. 21, 22, 25. *De Gruyther K.C. and Kenworthy Brown* for the appellant. When the mortgagees were put into possession and when they transferred the property the plaintiff had an interest in remainder which was not thereby affected. The suit being by a reversioner is governed by art. 140, and therefore is not barred. That view is supported by *Runchordas Vandrawandas v. Parvatibhai*.⁽¹⁾ The plaintiff cannot have lost her right to redeem before she became entitled to do so. The view in the High Court renders art. 140 of no effect. But in any case art. 134 applies to a mortgaged property only when a mortgagee in possession under the mortgage has purported to transfer an absolute interest. Here the mortgagees at the date of the transfer were not in possession under the mortgage of 1863, but under a defective absolute title; in effect they transferred only their mortgagee rights. [Reference was made also to *Husaini Khanam v. Husain Khan* (2); *Ram Piari v. Budh Sen*(3); and *Bhup Singh v. Zain-ul-abdin*.⁽⁴⁾].

Upjohn K.C. and Dube for the respondent. Art. 134 applies exactly to this case. More than twelve years before the suit there was a transfer of possession by a mortgagee for valuable consideration. In *Radhanath Doss v. Gisborne*⁽⁵⁾ Lord Cairns, in referring to the corresponding provision of the Act of 1859, says it means a purchaser of "a de facto mortgage upon a representation made to him, and in the

(1) (1899) L.R. 26 I.A. 71.

(3) (1920) I.L.R. 43 A. 164.

(2) (1907) I.L.R. 29 A. 471.

(4) (1886) I.L.R. 9 A. 205.

(5) (1871) 14 Moo. I. A. 1, 16.

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full belief, that it is not a mortgage, but an absolute title." That language applies, if not to the mortgage of 1898, to the sale of 1903. The respondent is supported by *Husaini Khanam v. Husain Khan*(1) and cases there cited. Art. 134 is to be regarded as an exception out of art. 148. Art. 140 does not apply. The article applies only to reversionary interests created by a settlement. In India an equity of redemption is not an estate: see Transfer of Property Act, 1882, s. 60. Here the wrongful possession occurred while a person entitled in fee had the right to sue, and under s. 9 time having commenced to run continued to do so. The plaintiff was not a reversioner for the purpose of art. 140: *Kashi Prasad v. Inda Kunwar*.(2)

Ksnworthy Brown in reply. Even if there was a transfer of possession within art. 134, art. 140 is a proviso to that article and governs this case. If, as is possible, neither art. 134 nor art. 140 apply to the circumstances, then art. 148 governs the case, and under that article the suit was not barred.

March 19. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the High Court at Allahabad in a suit brought by Mrs. Alice Georgina Skinner against the respondent for the redemption of five villages specified in the plaint. The question that has to be determined by this Board is whether the defendant is protected by art. 134 of the Limitation Act of 1908. The suit involves the dispositions of the property of the plaintiff's family which have been the subject of litigation in India on previous occasions. For the present purpose it is necessary to state the material facts in order of date.

In September, 1863, Thomas Skinner, the plaintiff's father mortgaged the villages in suit together with other property to Seth Lakshmi Chand and Seth Gobind Das for the sum of Rs. 50,000. It was a simple mortgage, with a covenant to pay the principal on December 31, 1863, and to put the mortgagees in possession if there was default in payment of principal and interest. The principal was not duly paid;

(1) (1907) I. L. R. 29 A. 471.

(2) (1908) I. L. R. 30 A. 490, 498.

but it does not appear that the mortgagees took possession at any rate during the mortgagor's lifetime. In October, 1864, Thomas Skinner made a will by which in the events that happened he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff. Each interest was contingent on the holder of the prior estate dying without male issue; but the three sons who were successively life tenants did die without lawful issue.

In November, 1864, Thomas Skinner died, and his eldest son, Thomas Browne Skinner, became tenant for life. In fact, however, Thomas Browne Skinner assumed an absolute interest in the property; it was not until the will of his father received interpretation from this Board in 1913 in a suit brought by the second son that the limited interests were judicially ascertained. Acting as absolute owner in November, 1867, Thomas Browne Skinner mortgaged the property which was the subject of the original mortgage of 1863 to Seth Gobind Das for the sum of Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage. The principal sum and interest was to be paid in eight years. The name of Seth Gobind Das was to be entered in the revenue papers as mortgagee and that of Thomas Browne Skinner as proprietor; the mortgagor was to continue to collect the rents under the supervision of agents of the mortgagee, and the proceeds, less agreed deductions, were to be applied to reducing the amount due.

In 1872 money decrees were obtained against Thomas Browne Skinner, and his equity of redemption in the villages in suit was sold in execution and bought by Seth Lakshmi Das, who therefore entered into possession of them on the footing of being absolute owner. It will be observed that the above transactions took place in the names of Gobind Das and Lachman Das respectively, but it has been assumed throughout, no doubt accurately, that the parties duly represented the original mortgagees of the mortgage of September, 1863.

On December 26, 1898, Lachman Das, purporting to be absolute owner, mortgaged with possession the five villages

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J. C. with much other property to the Nawab of Rampur for
 1929 Rs. 15,00,000, "with all the proprietary and zamindari rights." On September 24, 1903, the Collector of Muttra, acting as
 SKINNER guardian of the infant sons of Lachman Das, sold the whole
 v. of the mortgaged property together with jewellery, which
 NAUNIHAL had been the subject of a previous mortgage, to the Nawab
 SINGH. of Rampur in satisfaction of all claims under the mortgages. The conveyance transfers all the estate right, title and interest
 — of the wards in the property, which included, of course, the
 five suit villages.

On April 11, 1904, the Nawab of Rampur sold the five villages to the respondent, Naunihal Singh, for Rs. 1,77,000. The purchaser had the prudence to take what appears to be a warranty of title, for which he may ultimately have occasion to be grateful.

Meantime, in 1900, Thomas Browne Skinner died. He was succeeded by his brother, Richard Ross Skinner, who, in 1906, commenced a suit against the present respondent, amongst others, to recover possession of the suit villages and other property. In this suit it was decided by this Board, reversing the decision of the High Court, that under the will of Thomas Skinner, his son, Thomas Browne Skinner, took only a life interest, and therefore the respondent's predecessors in title could not have acquired through him an absolute interest. They held, however, that though Lachman Das did not acquire an absolute interest from Thomas Browne he yet, notwithstanding the terms of the mortgage of 1864, must be held to be still entitled to his rights under the mortgage of 1863 created by Thomas Skinner. These rights, it was held, passed to the subsequent purchasers, and therefore the plaintiff Richard Ross Skinner was not entitled to recover possession of the property except on condition that he redeemed the mortgage security. The suit was remitted for this condition to be performed, but in 1913 Richard, the plaintiff, died, and the suit abated.

He was succeeded by his brother George who, in 1917, filed a suit for redemption against the present respondent and others in respect of the five suit villages and other

property. However, in 1919, George died, and his suit abated.

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He was succeeded by his sister Alice, who brought her suit for redemption against the present respondent and others for recovery of possession and redemption of the suit villages and other property. In the course of the proceedings Mrs. Alice Skinner, the plaintiff, died, but, as she had acquired an absolute interest, this suit was not abated, and is continued by James Skinner, her executor, the present appellant. By their written statement the defendants disputed the plaintiff's title and claimed to have been in adverse possession by themselves or their predecessors since 1872.

The learned Subordinate Judge found in favour of the plaintiff's title, as to which there is now no dispute. He held that the defendants could not avail themselves of adverse possession both because the time for redemption was, by art. 148 of the Limitation Act, sixty years, which had not expired, and because, in any case, by art. 140, the plaintiff's right to sue did not arise until 1919, when after the death of the tenants for life she, by virtue of the remainder to her, became entitled to possession. The learned judge therefore decided in favour of the plaintiff, and made a preliminary order on February 28, 1922, that the defendants should within a month deliver accounts of the income received from the villages during their possession in order that he might arrive at a fixed sum. This order not being appealed, on January 20, 1923, the learned judge made a preliminary decree for redemption, in which he fixed the sum due to the defendants on account of principal, interest and costs to be Rs. 1,09,641, and decreed that if the plaintiff paid that sum into Court before July 3, 1923, the defendants should retransfer the property to her, and that on default by the plaintiff the property should be sold.

From this decree an appeal was brought, and by permission of the High Court a further appeal was entered from the order of February 28, 1922. On the hearing before the High Court the defendants for the first time raised the defence that they were entitled to succeed by reason of the provisions

J. C. of art. 134, which fixed the period of limitation for a suit, 1929 "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration," at twelve years from the date of the transfer.

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No evidence had been given in the Court below to support the plea. Such evidence must include all the documents of mortgage and sale which have been set out above, and which had not been proved or printed. The learned judges, however, came to the conclusion that as there could be no doubt as to the material facts and as the necessary documents had been printed before in the case decided by the Privy Council in 1913 they should allow the point to be argued. Their Lordships cannot approve of this decision, which appears to have been made against the protests of the then respondents. It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court. The position is not improved where the matter is mooted for the first time in an appellate Court on a point not taken before the trial judge. Their Lordships would have felt a difficulty in permitting the respondent to rely upon this ground before them were it not that before the Board the appellant consented to the question being raised on the materials placed before the High Court. With this expression of opinion upon the procedure below their Lordships therefore proceed to determine the appeal.

When the facts and documents are examined it appears that the defence founded on art. 134 cannot be supported. The transfer of property mortgaged contemplated by art. 134 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. Such an interest purported to be transferred by Lachman Das' mortgage to the Nawab of Rampur in

1898, where the mortgagor purported to mortgage as absolute owner; and also purported to be transferred by the sale in September, 1903, under which the respondent claims his absolute title. Their Lordships have little doubt that had Thomas Browne Skinner had the absolute title to the equity of redemption at the time when Lachman Das purported to transfer the absolute title to the Nawab the case would have been brought within art. 134.

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The appellant sought to put a limited construction on the article by contending that it only applied where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee. It did not apply, they said, where, as here, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption, and had obtained possession not under the mortgage but under the purchase of the equity in 1872. Their Lordships see no reason for accepting this view. It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee, and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in the present case the transfer which is ex concessis ineffective to give the absolute title was made during the existence of the particular estate vested in Thomas Browne Skinner, and in such a case the provisions of art. 140 apply. It was, indeed, faintly contended by the appellant that the plaintiff claiming only an equity of redemption did not come within the meaning of a remainderman. It appears to their Lordships that so to hold would be to do violence to the language and reasoning of this Board in *Skinner v. Naunihal Singh*(1) in 1913, and would be inconsistent with the ordinary meaning of the term.

Whether Thomas Skinner settled the estate subject to the incumbrance or whether he settled the equity in either case he created a contingent remainder, which vested in the plaintiff in possession in 1919 on the death of the last of her brothers

(1) L.R. 40 I.A. 105.

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without issue. So far, therefore, as the defendant relies upon the enjoyment of the absolute title for ten years from the transfers from Lachman Das and his successors in 1898 and 1903 he is defeated by the provisions of art. 140. It is unnecessary to add that if the transfer ultra the mortgage interest had taken place in the lifetime of Thomas Skinner, the settlor, so that time had begun to run in his lifetime, art. 140 would not have availed the plaintiff. This is in accordance with s. 9 of the Limitation Act, which itself follows the provisions of the English law. As it is, however, the defendant is defeated in his enjoyment of the absolute title by the provisions of art. 140.

He then has to fall back upon the transfer to him of the mortgage interest of Lachman Das in the original mortgage of 1863 which, according to the decision of the Privy Council in 1913, was *quoad tantum* transferred to him in the folds of the larger title which he thought he was getting. But if he has to rely upon a mortgage title then he must take it subject to the obligation of all mortgage titles—namely, the obligation to be redeemed. It is conceded and is plain that art. 134 does not protect the transferee of a mortgage by express transfer, and it appears to their Lordships idle to suppose that it protects a person who has taken a transfer only of a mortgage, but has taken it without his knowledge, mistakingly supposing that he was getting something better in circumstances like the present, where he cannot maintain his superior title by reliance on any period of limitation. Resting as he does on the interest of mortgagee he is liable to be redeemed. The period of redemption began, it is true, in the lifetime of Thomas Skinner, and art. 140 has no application, but the statutory period runs for sixty years, and had not expired when the plaintiff filed the present suit.

Their Lordships therefore are of opinion that this appeal should be allowed with costs here and below and the order of the Subordinate Judge restored, and that the case should be remitted to the High Court to make such additions to the decree as may seem just to the plaintiff in view of the fact that possession has been withheld from him and his testatrix

since the date fixed in the preliminary decree. The right to possession will be governed by the preliminary decree with which, as their Lordships are informed, the plaintiff has complied. Their Lordships will humbly advise His Majesty accordingly.

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Solicitors for appellant: *Chapman-Walker & Shephard.*

Solicitors for respondent: *Douglas Grant & Dold.*

MOHABBAT ALI KHAN (PLAINTIFF) . . . APPELLANT;

J.C.*

AND

MAHOMED IBRAHIM KHAN AND OTHERS }
(DEFENDANTS). } RESPONDENTS.

March 7.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER, NORTH-WEST FRONTIER PROVINCE.

Mahomedan Law — Marriage — Legitimacy — Continuus Cohabitation— Acknowledgments — Presumption — Clan addicted to Concubinage— Admissibility of Evidence—Absence of Parda.

The son of a Mahomedan by a female servant in his house claimed a declaration of his legitimacy. The parents had continuously cohabited for many years, and the father on several occasions had acknowledged the plaintiff as his son. There was some evidence of a nikah marriage:—

Held, that evidence that other members of the father's clan had illegitimate children by servants was inadmissible to rebut the presumption of legitimacy arising from the acknowledgments, and that though the fact that the mother, unlike the father's other wives, was not parda-nishin was one to be considered, it was insufficient to interfere with the presumption of law or the balance of proof of the fact of legitimacy.

Decree of the Judicial Commissioner reversed.

APPEAL (No. 53 of 1928) from a decree of the Court of the Judicial Commissioner (January 24, 1927) reversing a decree of the District Judge, Kohat.

The appellant, a Mahomedan, sued claiming (inter alia) a declaration that he was the lawful son of Khushdil Khan.

*Present: LORD SHAW, LORD WARRINGTON OF CLYFFE, LORD ATKIN,
SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

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deceased. The District Judge made a decree accordingly, but it was reversed on appeal to the Court of the Judicial Commissioner.

The facts and the grounds of the decisions appear from the judgment of the Judicial Committee.

1928. Dec. 3, 4. *De Gruyther K.C.* and *Parikh* for the appellant.

Dunne K.C. and *W. Wallach* for the respondents.

As to the presumption arising from acknowledgments reference was made to *Fuzeelum v. Abdool Wahed* (1); *Sadik Husain Khan v. Hashim Ali Khan* (2); *Imambandi v. Mutsaddi* (3); *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (4); Ameer Ali, *Mahomedan Law*, 3rd ed., vol. ii., p. 255, and Wilson's *Anglo-Muhammadan Law*, ss. 84, 85; and as to the observation of parda in the North-West Provinces to *Jamil-ud-din v. Abdul Majeed*. (5)

March 7. The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from a decree of the Judicial Commissioner for the North-West Frontier Province dated January 24, 1927, which set aside a decree dated April 14, 1925, of the Court of the District Judge, Kohat. The District Judge had decreed that the appellant is the legitimate son of one Khan Sahib Khushdil Khan. The Judicial Commissioner reversed this judgment and dismissed the plaintiff's suit.

The plaintiff was born in 1906. It is not disputed that he is the son of Khushdil Khan by Musammat Babo. Various questions were raised in the case, but the only point remaining for determination in this appeal is whether the appellant is the legitimate son of Khushdil Khan, that depending upon whether Khushdil and Musammat Babo were married persons.

In August and September, 1923, Khushdil had serious attacks of illness, accompanied by paralysis and aphasia. While still suffering from these diseases he, on April 2, 1924,

(1) (1868) 10 S.W.R. 469, 474. (3) (1918) L.R. 45 I.A. 73, 82.
 (2) (1916) L.R. 43 I.A. 212, 231. (4) (1921) L.R. 48 I.A. 114.
 (5) (1915) 13 All.L.J. 361.

executed a deed of gift by, as was alleged, making his thumb impression upon the deed after the provisions thereof had been carefully explained to and assented to by him. This part of the case drops out, both Courts below having concurred in finding that Khushdil was proved to have been mentally incapable of understanding the deed on account of his illness, and that the deed was therefore invalid.

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The remaining part of the suit, however, is head 1 of the plaint, which asks the Court to pronounce a declaratory decree "that plaintiff is the lawful son of the said Khan Sahib Khushdil Khan," and upon this the Courts below have differed. If the plaintiff is the lawful son he is the sole male heir of Khushdil and the property rights in the deceased's estate would be regulated accordingly.

The question whether Khushdil and Musammat Babo were married is one of fact, and as such was investigated and has been summarized with the utmost care by the District Judge. A most important part of the case attempted to be made by the respondents was that such a marriage was legally impossible, because at the time of the marriage, and the birth of the appellant, the lady was already married to one Ilyas. The respondents plead that "her husband Ilyas died six or seven years ago and she was bound to him by nikah up to that time." Had this been established it would, of course, have been a complete answer to the appellant's suit. Both Courts below, however, have agreed that there was no such marriage, and that the body of evidence produced to that effect is altogether untrustworthy. As the District Judge puts it, "the story that Ilyas was married to Musammat Babo is fictitious."

What remains accordingly is of a limited scope. But it must be observed that the witnesses denying the marriage of Musammat Babo with Khushdil are very largely the same persons who allege the fictitious story of her marriage with Ilyas. This circumstance does not seem to have had attached to it by the Judicial Commissioner the weight which was its due.

It is unnecessary for the Board to recapitulate in detail the evidence given in the case. They are satisfied that the

J. C. conclusion upon that evidence, oral and documentary, and
1929 taken as a whole, by the District Judge, was sound.

MOHABBAT ALI KHAN v. MAHOMED IBRAHIM KHAN. — Was there a nikah ceremony? It is in evidence that it was solemnized by Imam, who is one of the witnesses: a cousin of the bride, now dead, acted as padar vakil, that is agent for the bride. Two others who acted as the required witnesses are also dead. Three other persons have given evidence in support of the marriage. It is possible to criticize with much effect such oral evidence, but fortunately the case does not stand upon this alone. The life history of the parties has to be considered.

Upon that there can be no doubt that Khushdil, the father, acknowledged Mohabbat Ali Khan, the plaintiff, as his son, and this in circumstances which were clearly equivalent to an affirmation that he was a legitimate son. Shortly after the boy's birth, namely, in August, 1906, Khushdil Khan stated on oath that he had got a son. This meant the appellant, who was his only son at the time. Further, the son and his mother lived in family with Khushdil, and continued to do so from his birth in 1906 to the date of Khushdil's death in 1925. The circumstances of the family were these. Before the marriage to Musammat Babo, Khushdil Khan had already married thrice, but about the year 1903 only two of his wives were alive. By one of these wives he had one daughter. There were also born to him two sons by another of his wives, but they died before 1904, and he had only a daughter alive. As the Judicial Commissioner says in his judgment: "It seemed unlikely that he would beget a son from any of his existing wives, and in a desire to have male offspring he may well, argues counsel for plaintiff, have turned to a maid-servant of his own household in the hope of obtaining it; there would, therefore, have been nothing unnatural in a marriage between the two."

The argument, the learned Commissioner thinks, is far from convincing, and he refers to a certain view which he entertains as to the practice of other members of the family than Khushdil. To that allusion will be subsequently made.

These being the domestic facts, it is not questioned that the appellant and his mother lived continuously in the deceased's house, and the appellant was brought up as one of his family.

One fact in particular may be alluded to. When the boy reached school age a notable circumstance is that Khushdil signed an application to the Headmaster, Government High School, Kohat, saying: "I request you to kindly admit my son Mohabbat Ali in the school. The necessary information is given on reverse (below). I herewith produce the School Leaving Certificate. I hereby declare that he has not been admitted so far in any recognized school." The appended information includes the following: "Date of birth—1st January, 1906. Father's name—Khushdil Khan, Rais, Kohat. Caste or tribe—Mussalman, Afghan, Izzat Khel." This is signed by Khushdil in his own hand, giving the particulars of his own son and his own tribe, the date being April 11, 1919. Two years later a leaving certificate is given that "Mohabbat Ali Khan, son of Khan Sahib Khushdil Khan, attended the Government High School, Kohat District, from April 11, 1919, to April 2, 1921." This certificate was applied for by Taj Mohammad Khan, a cousin of Khushdil, and in the application he referred to the appellant as "my brother's son, Mohabbat Ali Khan."

Further, a number of transactions relating to land, and in revenue records, appear from documents produced, in which the appellant is described by Khushdil and his relatives and others as "Khushdil's son." The documents have been produced, and they are referred to in detail in the judgment of the District Judge; it is sufficient to say that they appear to demonstrate with clearness both the sonship and the legitimacy of the appellant. The father took much interest in his upbringing, and there are letters between both the father and the son on the one hand, and other members of the family on the other, showing that the interest in his upbringing and education was shared by these relations. Throughout the transactions and correspondence referred to, no suggestion of any kind appears to the effect that Mohabbat

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J. C. was illegitimate. The entire body of facts is confirmatory
1929 of his legitimacy.

~~MOHABBAT ALI KHAN v. MAHOMED IBRAHIN KHAN.~~ The law applicable to such a case is quite settled. As Dr. Lushington, delivering the judgment of the Board, observed in *Khajah Hidayut Oollah v. Rai Jan Khanum* (1); "Where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place."

According to Sir R. K. Wilson's Digest of Anglo-Muhammadan Law, s. 84: "In all cases in which marriage may be presumed by co-habitation, combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purposes of establishing paternity." Sect. 85 may be also quoted: "If a man has acknowledged another as his legitimate child the presumption of paternity arising therefrom can only be rebutted by (to confine the instances to the one relevant) (d) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledger could have been begotten." Evidence upon this last head was, as already mentioned, admitted under the allegation that the appellant's mother was married to Ilyas, but proof of the allegation completely failed.

The present case accordingly is one of an acknowledgment by the father, an acknowledgment which involves the assertion that he, the father Khushdil, was married to Musammat Babo, the appellant's mother. Such acknowledgment undoubtedly raises a presumption in favour of the marriage and of the legitimacy.

The presumption is no doubt rebuttable, and if there is proof aliunde on the subject to the effect that there was no such marriage in fact, the same position is reached as if no such marriage had been possible. A recent instance of

positive disproof of the marriage was *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury*.⁽¹⁾ As Lord Dunedin put it: "Such acknowledgment in face of the fact that there was no marriage is of no avail," and the general law was summed up in the same judgment as follows: "A claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact."

It would accordingly appear clear that it rests upon the respondents in this case to establish that there was no marriage.

It might not be considered necessary to enter into any question of presumption of proof, as their Lordships find themselves in agreement with the District Judge to the effect that the marriage is proved; and they do so on a broad induction of the oral and documentary evidence as a whole.

But their Lordships think it expedient to deal with the reasons which have induced the Judicial Commissioner to differ from the District Judge. He correctly says: "The law presumes in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years. There is ample authority for this position, which will be found cited in a ruling of the Lahore High Court: *Indar Singh v. Thakar Singh*.⁽²⁾" He then proceeds as follows: "The strength of the presumption, however, will obviously vary according to the circumstances of each particular case, and the habits of the Izzat Khel clan in the matter of concubinage with maidservants and slave girls can scarcely be described as normal. We know of four certified cases of sons born of slave girls (kanizakzadas). These are . . . It is on the record, or has been held by the Courts, that Mawaz was the only one of these four whose father entered into a lawful marriage with his mother. The

(1) L.R. 48 I.A. 114, 120, 121.

(2) (1921) I.L.R. 2 Lah. 207.

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J. C. other three were the offspring of concubines outside wedlock.
 1929 The names of other kanizakzadas have been mentioned; so
 MOHABBAT that there are at least four and probably several more of such
 ALI KHAN cases amongst the immediate descendants of Sher Ali Khan,
 v. i.e., the family with which we are now concerned. The
 MAHOMED presumption in favour of legitimacy arising from continuous
 IBRAHIM cohabitation over a period of years is one which is based on
 KHAN. — public policy, and in the case of Muhammadans, no doubt,
 on the well known doctrine of Muhammadan law, which
 abhors bastardy. In a family like the present, however,
 which pays scant regard to the matrimonial tie in the begetting
 of children from women of low caste, the presumption, in my
 opinion, must be so small as to be practically negligible. It
 might operate as a factor to turn the scale where the evidence
 for and against a marriage is equal, but it is not sufficient to
 transfer from a claimant son some obligation to prove his own
 legitimacy. So the burden of proof may be regarded as being
 equally distributed over the parties."

The Board think it right to say at once that it can give no countenance to the doctrine here set forth. It amounts to this, that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives; an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage. The suggestion further appears to be: that the facts of the particular case, in which evidence is given pro and contra bearing upon the issue of marriage, are not to be regulated by the well known presumptions of law, but that these presumptions are to be wiped out by reason of the conduct and mode of life and predilections of other persons. Each case of each of these relatives would have required to be separately investigated on its own merits: without that, the way is opened for family gossip on a wide scale, prompted by motives unknown and knowledge untested.

A further suggestion of which their Lordships cannot approve appears to amount to this: that a court of law on evidence such as is given here would pronounce a view to

the effect that there was a clan proclivity towards concubinage rather than marriage, and therefore that marriage and the legal presumptions in favour of it cannot be sustained.

Their Lordships think it right further to say that the evidence on this subject should not have been allowed by the District Judge. He attached no weight to it himself, but it was not only without weight, it was without competence.

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It remains to be added that undoubted difficulty arises in the case on account of the fact that the mother of the appellant was not a parda-nishin lady. The other wives lived behind the parda according to the well known Mahomedan habit. They were strict Mahomedans, young persons brought from Afghanistan. The third wife, Musammat Babo, had been in fact a maid-servant and housekeeper in the household of the deceased. When the marriage took place she continued her duties in the household and was not parda-nishin. Even if that had involved or recognized a lack or disregard of social status, these things were essentially matters for herself and her husband to consider. But it is no part of the law of India that to have lived and to remain behind the parda is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue. But that issue is to be determined on a broad conspectus of the whole situation, including of course the parda item. In the present case, it is by no means sufficient to interfere either with the presumptions of law or the balance of the proof of fact.

Their Lordships will humbly advise His Majesty to allow the appeal and to restore the judgment of the District Judge: the costs of the case from that date, that is to say, in the appeal to the Judicial Commissioner and to His Majesty in Council, to be paid by the respondents.

Solicitors for appellant: *T. L. Wilson & Co.*

J. C.* MA SIN APPELLANT;

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Feb. 12

AND

COLLECTOR OF RANGOON RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT RANGOON.

Land Acquisition—Declaration of intended Acquisition—Later Declaration cancelling first Declaration—Land referred to in both Declarations—Date at which Compensation to be Calculable—Land Acquisition Act (I. of 1894), ss. 6, 23.

The local Government published under s. 6 of the Land Acquisition Act, 1894, a declaration that land belonging to the appellants respectively and land belonging to other persons were required for public purposes. Five months later the Government published another declaration for the acquisition of the appellants' lands only; the declaration stated that the earlier declaration was thereby cancelled:—

Held, that having regard to s. 23, sub-s. 1, of the Land Acquisition Act, 1894, the compensation should have been based upon the value of the land at the date of the publication of the later declaration.

Decree of the High Court reversed.

CONSOLIDATED APPEALS (No. 106 of 1927) from a decree of the High Court (February 1, 1926) modifying two decrees of that Court in its original jurisdiction.

The decrees appealed from were made in appeals from decrees or order in two references under s. 19 of the Land Acquisition Act, 1894.

The only question of principle which arose was as to the date upon which the market value was to be considered, having regard to the fact that the Government had published in October, 1923, a declaration of its intention to acquire the appellants' land, which cancelled a declaration of May, 1923, referring to the appellants' land and to certain other land.

The High Court, on appeal (Rutledge C.J. and Maung Ba J.), held that the material date for consideration was that of the earlier notification, since in their view that notification practically remained good so far as the plots in question were concerned.

* Present: VISCOUNT DUNEDIN, LORD CARSON, and SIR CHARLES SARGANT.

1929. Feb. 12. *Samuel Moses* for the appellants.

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Sir George Lowndes K.C. and *E.B. Raikes* for the respondent.

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Reference was made to the Land Acquisition Act, 1894, ss. 6, 23, 48.

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The judgment of their Lordships was delivered by

Viscount DUNEDIN. This is an appeal from the High Court of Judicature at Rangoon, in a case in which they have altered the finding of the judge of the High Court of the original side in a land acquisition case.

The Government on May 31, 1922, had published a declaration under s. 6 of the Land Acquisition Act, 1894, that the appellants' land was required for a public purpose, and that declaration included, besides the land which they desired to take from the appellants, certain land belonging to other people. The Government seemingly changed their mind about requiring the land of the other people, and accordingly on October 6, 1923, they published another declaration under s. 6, specifying the same land belonging to them, but at the same time, announcing that the former declaration was cancelled.

The matter went before the Collector, and he gave a certain award, to which their Lordships need make no further allusion. An appeal was taken to a judge of the High Court, and that judge made an award by which he awarded Rs.6500 per acre in respect of one plot and Rs.3800 per acre in respect of another plot. Appeal and cross-appeal were taken to the Appellate Court, and the Appellate Court altered that judgment, replacing the figure of Rs.6500 per acre by a figure of Rs.5600 per acre, and replacing the figure of Rs.3800 per acre by a figure of Rs.2750 per acre.

The Appellate Court, in considering the sales upon which they based their judgment, after mentioning the two notifications, which their Lordships have already referred to, then said: "Though the word 'cancelled' was used to mean that the first notification was either superseded or modified, the first notification practically remained good so far as these two plots of Maung Ba Kyaw and Ma Sin are concerned.

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So in our opinion the market value at the date of the publication of the first notification should be the market value to be considered."

Their Lordships are unable to take that view, because it is absolutely in the teeth of s. 23, sub-s. 1 (1), of the Land Acquisition Act, 1894, which says that, in determining the amount of compensation to be awarded, the Court shall take into consideration "the market value of land at the date of the publication of the declaration relating thereto under s. 6."

Now, it is perfectly certain that the only notification which gave right to take this land was the second notification, and therefore that date must be the date taken. That really vitiates the judgment of the Appellate Court. It is apparent from the figures that all this land was galloping upwards in value, and in particular, that sales were proved, after the date of the first notification, but before the date of the second, which showed a highly increased value, and that it was in considering those sales, as well as the former sales, that the learned judge of first instance came to the result that he did. Their Lordships are therefore clearly of opinion that the judgment of the Appellate Court cannot stand, and that, as there seems nothing to be said against the judgment of the judge of first instance, that must be reverted to.

Their Lordships will humbly advise His Majesty accordingly to allow the appeal, to set aside the decree of the High Court in its appellate jurisdiction with costs, and to restore the judgment of the first judge. The appellants will have the costs of this appeal.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitor for respondent: *Sanderson, Lee & Co.*

AMJAD KHAN (PLAINTIFF) APPELLANT; J. C.*
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 A S H R A F K H A N AND OTHERS } RESPONDENTS.
 (DEFENDANTS). }
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[AND CONNECTED APPEALS.]

ON APPEAL FROM THE COURT OF THE JUDICIAL
 COMMISSIONER OF OUDH.

Mahomedan Law—Gift—Construction of Deed—Gift of Life Interest.

A Sunni Mahomedan of the Hanafi school executed a deed stating that he had made a gift without consideration of his entire property to his wife, subject to the condition that she should remain in possession of a share worth Rs.5000 with full power to alienate it, and that as to the rest, worth Re.10,000, she should not have power to alienate but should remain in possession for her lifetime, and that after the donee's death the entire property gifted away should revert to named collaterals. Upon the death of the donee her brother claimed the whole property as her heir. He contended that the intention shown by the deed was to make a gift of the whole property itself subject to a restrictive condition, and that under Mahomedan law the gift was valid, but the condition void:—

Held, that upon the true construction of the deed the subject-matter of the gift was a life estate in the whole property together with a power to alienate a third part, and that accordingly the suit failed; it was not necessary to consider whether a gift of a life estate was valid in Mahomedan law, because if it was not the suit equally failed.

Decree of the Court of the Judicial Commissioner affirmed.

CONSOLIDATED APPEAL (No. 125 of 1926) from two decrees of the Court of the Judicial Commissioner (December 2, 1924) varying a decree of the Subordinate Judge of Bara Banki.

The main questions for determination on the appeal related to the construction and legal effect of a deed of gift dated January 17, 1894, executed by a Sunni Mahomedan in favour of his wife.

The terms of the deed and the facts of the case appear from the judgment of the Judicial Committee.

*Present: LORD SHAW, LORD ATKIN, and SIR LANCELOT SANDERSON.
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The Subordinate Judge held that there had been a delivery of possession to satisfy Mahomedan law, the donor having managed the properties as agent for the donee. He construed the deed as giving the donee an absolute estate in one-third of the property, but not more than a life estate in the rest.

Both parties to the suit appealed. The learned Judicial Commissioners differed on the question whether there had been a sufficient delivery of possession; they agreed in holding that the intention of the donor was to give a life interest, but they differed as to the validity of such a gift under Mahomedan law. As, however, they agreed that the donee had no heritable interest in the property, the plaintiff's appeal was dismissed and the defendants' appeal allowed.

The plaintiff subsequently applied for a review, contending that in any case the donee was entitled to one-fourth of her husband's property, and that that share devolved upon the plaintiff as her sole heir. The application was dismissed on the ground that the claim had not been made in the plaint.

1929. Feb. 4, 5. *S. Hyam* for the appellant. The deed by its express terms purported to be a gift of the corpus of the property subject to conditions inconsistent with complete ownership. The effect in Mahomedan law is that the gift was valid but the conditions void: Ameer Ali's *Mahomedan Law*, 4th ed., pp. 133, 134; Wilson's *Anglo-Muhammadan Law*, para 313. The deed cannot be read as intending to create an ariat, or loan for use, which involves no transfer of ownership. A Sunni Mahomedan cannot validly make a gift of a life interest in property: *Hamilton's Hedaya*, p. 489; *Humeeda v. Budlun*(1); *Suleman Kadr v. Darab Ali Khan*(2); *Mahomed Faiz Ahmed Khan v. Ghulam Ahmed Khan* (3); *Abdul Walid Khan v. Nuran Bibi*(4); *Umes Chunder Sircar v. Zahoor Fatima*(5); *Banoo Begum v. Mir Abed Ali*(6). A Mahomedan can create a life interest by contract, but it was

(1) (1872) 17 S.W.R. 525.

(4) (1885) L.R. 12 I.A. 91.

(2) (1881) L.R. 8 I.A. 117, 122.

(5) (1889) L.R. 17 I.A. 201.

(3) (1881) L.R. 8 I.A. 25.

(6) (1907) L.L.R. 32 Bom. 172.

not established that the deed was the result of an arrangement among the family.

[Their Lordships intimated that they were satisfied *prima facie* that there had been a delivery of possession in accordance with Mahomedan law.]

Dube for the respondents. The deed should be liberally construed so as to give effect to the real intention disclosed: *Hunoomanpersaud's Case*. (1) Both judges in the Appellate Court were of opinion that the intention was to give a life estate in the whole property. Upon the true construction of the deed the subject-matter was a life estate, not the property itself subject to condition. Consequently, the Mahomedan law as to gifts with a restrictive condition does not affect the matter. Upon that construction there was not what the *Hedaya* terms a "retraction." Judgments of the Privy Council do not preclude a life estate being the subject of a gift by a Mahomedan: *Umjad Ally Khan v. Mohumdee* (2); *Mohammad Abdul Ghani v. Fakir Jahan Begam*. (3) In *Banoo Begum v. Mir Abed Ali* (4) Sir Lawrence Jenkins, in holding that among Shias a life interest can be created, pointed out that the judgment of the Board in *Humeeda v. Budlun* (5) had not discarded the possibility of such a transaction among Mahomedans. The creation without consideration of a life estate by a Mahomedan was supported as an ariat in *Mumtaz-un-nissa v. Tufail Ahmad* (6), as explained in *In re Khalil Ahmad*. (7) If the gift was of a life estate but such a gift is invalid in Mahomedan law the plaintiff has no cause of action.

Hyam in reply. The statement by the Board in *Humeeda v. Budlun* (5) that the creation of a life estate "does not seem to be consistent with Mahomedan law" is relied on as a reason for construing the present deed as being what its language states—namely, "a gift of the entire property subject to the condition" expressed.

(1) (1856) 6 Moo. I.A. 393, 411.

(5) (1872) 17 S.W.R. (Civ. Rul.)

(2) (1867) 11 Moo. I.A. 517.

525, 527.

(3) (1922) L.R. 49 I.A. 195, 209.

(6) (1905) I.L.R. 28 A. 264.

(4) (1907) I.L.R. 32 B. 172, 176.

(7) (1908) I.L.R. 30 A. 309.

j.c.

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Feb. 26. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. This is an apply by Amjad Khan, son of Salar Khan, who was the original plaintiff in the suit, against two decrees of the Court of the Judicial Commissioner of Oudh, dated December 15, 1924. The suit was brought by Salar Khan to recover possession of certain properties specified in the plaint, and mesne profits. The title of Amjad Khan (hereinafter called "the plaintiff") to two specific plots purchased by Musammat Waziran has been declared by both the Courts in India, and no question with regard to these plots arises in this appeal.

The dispute relates to proprietary shares in eleven villages; the shares belonged to one Ghulam Murtaza Khan.

It was alleged on behalf of the plaintiff that Ghulam Murtaza Khan made a gift of the said shares to his wife, Musammat Waziran, by a registered deed dated January 17, 1905, and put her in possession of the property, which was the subject of the gift; that Ghulam Murtaza Khan died on February 6, 1906, and his wife died on November 18, 1909, leaving her brother Salar Khan, the father of the appellant, her sole heir; and that on the death of Salar Khan the plaintiff appellant became entitled to the property in question.

The first two defendants are the nephews of Ghulam Murtaza Khan, who, it was alleged, took possession of the properties in suit on the death of Musammat Waziran; the other defendants are transferees from the first two defendants.

The learned Subordinate Judge, who tried the suit, came to the conclusion that the above mentioned deed of January 17, 1905, was in the nature of a family settlement, that Ghulam Murtaza Khan gave to his wife one-third of the property absolutely and a life estate only in two-thirds of the property which on his death was to revert to his heirs; and he made a decree accordingly.

The plaintiff appealed to the Court of the Judicial Commissioner of Oudh; the defendants Ashraf Khan, Basharat Khan and Nisar Ali Khan also filed an appeal.

The two appeals were heard at the same time. The learned Judicial Commissioners, though differing as to the reasons,

agreed as to the conclusion, and directed on December 15, 1924, that the plaintiffs' appeal should be dismissed, that the defendants' appeal should be allowed and that the plaintiff's suit should be dismissed except in respect of plots 397 and 618, which should be shown as having been decreed to the plaintiff. The two last mentioned plots are those as to which no dispute arises in this appeal.

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On January 18, 1894, Ghulam Murtaza Khan made a will, and on the same day executed what was called an agreement, by which he made a declaration that he would remain in possession of the properties comprised in the will as long as he lived, but that he should not have power to alienate the same.

On January 17, 1905, Ghulam Murtaza Khan executed the deed, on which the decision of this case depends; the terms thereof are as follows:—

"I am Ghulam Murtaza Khan son of Sarfaraz Khan, caste Bhatti, resident and Zemindar of Muhi-ud-dinpur, hamlet of village Jamoli, pargana Mawai Maholara, tahsil Ram Sanchighat, district Bara Banki.

"Whereas I am co-sharer of the following shares in the village comprised in Taluqa Mawai, in the above pargana and district, at present valued at Rs.15,000. Whereas I am in possession and occupation of the same and whereas in respect of the same I have already executed a will and an agreement dated January 18, 1894, but as I want to avoid any difficulty to my wife in obtaining possession over the willed property after me, I, therefore, by means of this document, have made a gift without consideration of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife Musammat Waziran, resident of Muhi-ud-dinpur hamlet of village Jamoli, in the above pargana and district, subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs.5000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs.10,000, she shall not possess any power of

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alienation but she shall remain in possession thereof for life-time. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals, viz. Ashraf Khan, Basharat Khan and their heirs, in equal shares, and those heirs of mine shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her, and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property, and my wife, Musammat Waziran, from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed. As to shares worth Rs.5000, gifted to the said lady, she has power to choose the same from any village she likes, or if she likes, she can take shares worth Rs.5000 from all the villages.

"Wherefore these few presents by way of a deed of gift have been executed, and got registered with the consent of the reversioners, viz. Ashraft Khan and Bashrat Khan, so that it serves as an authority and be of use in time of need."

An issue was raised in the trial Court whether Ghulam Murtaza Khan was a Hanafi Mussulman or whether he belonged to the Shia sect. The learned Subordinate Judge held that Ghulam Murtaza Khan was a Hanafi Mussulman and did not belong to the Shia sect.

It appears from the judgment of Mr. Ashworth, one of the learned Judicial Commissioners who heard the appeal, that the decision of the learned Subordinate Judge on this issue had been impugned in one of the grounds of appeal presented by the defendants, but that the ground had not been pressed, and the appeal was decided upon the basis that the Mahomedan law applicable was the Hanafi law and not the Shia law.

In order therefore to constitute a valid gift *inter vivos* under the Mahomedan law applicable to this case, three conditions are necessary: (1.) Manifestation of the wish

to give on the part of the donor. (2.) The acceptance of the donee, either impliedly or expressly. (3.) The taking possession of the subject-matter of the gift by the donee, either actually or constructively: see *Mohammad Abdul Ghani v. Fakir Jahan Begam*.⁽¹⁾

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The main argument on the hearing of the appeal related to the question of what was the subject-matter of the gift by Ghulam Murtaza Khan. This depends upon the construction of the deed of January 17, 1905.

It was argued on behalf of the plaintiff appellant that by the deed Ghulam Murtaza Khan transferred the corpus of the property therein specified to his wife without any reservation, but subject to certain conditions of enjoyment; that if the said conditions were inconsistent with the transfer of an absolute interest in the property, the Mahomedan law applicable to this case would give effect to the transfer, and would not give effect to the conditions; and that the deed coupled with possession given to the donee constituted a good and valid gift of all the property comprised in the deed.

On the other hand it was argued on behalf of the defendant respondents that by the deed Musammat Waziran acquired merely a life interest in the property comprised therein, that such interest ceased on her death in 1909, and that inasmuch as the plaintiff's only claim to the property was as heir of Musammat Waziran, he had no title thereto.

The principle on which the plaintiff relied was that where it is clear that the intention of the donor is to make a gift to the donee of the corpus of the property comprised in the gift, and there is a condition attached that the donee should take a limited interest or should take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute gift of the property: in other words, it was argued that if a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void: see Wilson's Digest of Anglo-Muhammadan Law, 1908 ed., para. 313.

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Among other authorities reliance was placed by the learned counsel for the plaintiff appellant upon *Humeeda v. Budlun* (1), for the purpose of showing that the creation of a life estate by means of a gift *inter vivos* does not seem to be consistent with Mahomedan usage. It was held by the Judicial Committee that there ought to be very clear proof of so unusual a transaction, and that in that case there was no such proof.

It should be noted that the facts of the cited case differ materially from the case now under consideration, inasmuch as in the present case there is before the Board the formal deed of gift, upon the true construction of which the decision must depend.

Other authorities were referred to during the course of the argument, but in their Lordships' opinion it is not necessary to refer to them in detail, for the reason that the above mentioned principles were not disputed by the learned counsel for the defendant respondents: their case was based on the argument that the subject-matter of the gift in the deed of January 17, 1905, was a life interest only in the property and that it was not a gift to the wife of an absolute interest in the property with an inconsistent condition.

The material question then is what is the true construction of the deed. The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used.

Their Lordships, basing their decision on the terms of the deed, are of opinion that the conclusion arrived at by the learned Judicial Commissioner, Mr. Wazir Hasan, on this part of the case is correct, and that Musammat Waziran acquired merely a life interest in the property under the deed of January 17, 1905, together with a power of alienation over one-third of the property.

The donor by the terms of the deed purported to make a gift without consideration to his wife of the entire property detailed therein: he divided the property into two parts, one-third and two-thirds, with a view to giving his wife a

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power to alienate the one-third of the property or any part thereof by way of mortgage, sale or gift. The words used in connection with the power of alienation point to the donor contemplating a possible alienation by his wife during her lifetime of the one-third or part thereof. It was further provided that after the death of the donee "the entire property gifted away by this document" should revert to the donor's collaterals named therein.

It is to be noted that the provision as to reversion is not limited to the two-thirds over which the wife was to have no power of alienation, but is related to the "entire property gifted away by this document." The "entire property" was to revert to the collaterals, but it would, of course, be subject to any mortgage, sale or gift which the wife had power to make during her lifetime in respect of the one-third part of the property mentioned in the deed.

Reading the deed of January 17, 1905, as a whole and giving effect to all the terms thereof, their Lordships are of opinion that it does afford clear proof that the donor intended to make and did make a gift to his wife of a life interest only in the entire property comprised in the deed together with the above mentioned power of alienation in respect of one-third of the property.

It was, however, further argued on behalf of the plaintiff that under Mahomedan law, which is applicable to this case, a transfer of a life estate could not be made by means of a gift: in other words, it was argued that under the said law there could not be a transfer of any interest in property by way of gift *inter vivos* except an absolute interest.

In their Lordships' opinion, it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff appellant is on the horns of a dilemma. If the interest acquired by Musammat Waziran was of a life estate only, and if such an interest can be acquired under Mahomedan law by way of gift, that interest came to an end on the death of Musammat Waziran, and the plaintiff claiming as her heir has no title to the property. On the other

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hand if, as argued on behalf of the plaintiff, under the Hanafi law such a limited interest as a life estate could not be transferred to Musammat Waziran by way of gift *inter vivos*, then Musammat Waziran acquired no interest in the property under the deed of January 17, 1905, and the plaintiff, claiming as her heir, can have no title to the property.

For the above mentioned reasons their Lordships are of opinion that the plaintiff appellant has no title to the property which is now in dispute in this appeal.

In view of this conclusion, it is not necessary for their Lordships to consider any of the other points raised in the appeal, as, for instance, the question whether there was delivery of possession, as to which the learned Judicial Commissioners came to different conclusions. Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.

Upon a further application by the appellants on a point raised in reason 11 (1) of their case, their Lordships do not think it necessary to add anything to the judgement. The point was made on an application for review in the Appellate Court, and it was held that it was not open to the appellants. Their Lordships see no reason for differing from the Appellate Court's decision in this respect.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Watkins & Hunter.*

(1) This was a claim that if the deed was bad in law the donee was entitled to a quarter share of her husband's estate by inheritance, and that the appellant was heir thereto.

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SECRETARY OF STATE FOR INDIA IN }
COUNCIL (DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Minerals—Unenfranchised Service Inam—Finding that Estate held under Grant from Zamindar—Second Appeal—Absence of Proof of Grant of Minerals—Code of Civil Procedure (Act V. of 1908), ss. 100, 101.

The owner, by a purchase in 1879, of twenty-seven villages in the Northern Circars claimed that he was entitled to the underlying minerals. The villages had formed part of an estate held by the vendor's fore-fathers as mansabdars. In or about 1785 the mansabdar had been paying a fixed annual sum to a neighbouring zamindar, and was under an obligation to provide him with 700 peons. In 1802 the zamindari was permanently settled, the annual payment by the mansabdar being treated as among the assets upon which the peisheash was fixed. In 1847 the Government acquired the zamindari, and in 1859 commuted the services for an annual payment. There had been no enfranchisement of the inam. The Subordinate Judge (on appeal from the Munsif) found that the estate was originally held under a grant from the zamindar subject to a fixed rent and an obligation to provide a military force. Upon appeal it was contended that the mansabdars had been independent chieftains and did not take under any grant:—

Held, that the above contention was inadmissible, as there was evidence upon which the finding of the Subordinate Judge could have been based, and that it was therefore binding under the Code of Civil Procedure, 1908, in the second appeal; and as it was not established that the grant by the zamindar included the minerals the suit failed.

Sashi Bhushan Misra v. Jyoti Prashad Singh Deo (1916) L.R. 44 I.A. 46 followed.

APPEAL (No. 72 of 1927) from a decree of the High Court (March 31, 1925) reversing a decree of the Subordinate Judge of Coeanada (December 12, 1921) affirming a decree of the District Munsiff.

The appellant instituted a suit against the respondent Secretary of State claiming a declaration that he was entitled to the underground rights in certain villages in the Northern Circars; he claimed also a return of sums collected from his

* Present: LORD SHAW, LORD DARLING, LORD ATKIN, LORD TOMLIN, and SIR LANCELOT SANDERSON.

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The facts of the case and the course of the proceedings in India are stated in the judgment of the Judicial Committee.

The appeal to the High Court was finally heard by Phillips and Odgers J.J. The learned judges pointed out that the High Court had already held that the villages had not been enfranchised. It had been found that Totapalli was held as an inam burdened with service. By a series of decisions of the Privy Council the onus was upon the plaintiff to show that the minerals were included in the grant, but there was no evidence that that was so. Nor was there anything in the judgment of the Privy Council in 1870 to support the view that the mansabdar was in the position of an independent chief. The suit was accordingly dismissed.

1929. Feb. 12, 14, 15, 18, 19. *De Gruyther K.C.* and *Narasimham* for the appellant. The material before the Board as to the early history of the estates concerned shows that the holder of Totapalli was an independent chieftain owning all rights in the soil of the estate. Though Totapalli was subjugated by Peddapur and a tribute, in the form of services and an annual payment, was imposed the rights of the mansabdar in the soil remained unaffected. He held independently of any grant; there is no indication that one was made. Upon the permanent settlement of Peddapur the annual tribute was naturally treated as an asset in fixing the peisheash, but that did not affect the title of the mansabdar to all the rights in the soil. The proceedings before the Board in the appeal of 1870 (1) show that there was no creation of a tenure under Peddapur, but a recognition of hereditary right as zamindars. As the mansabdars did not hold under a grant the decision of the Board in *Sashi Bhushan Misra v. Jyoti Prashad Singh* (2), and similar cases, do not apply. Nor has *Secretary of State for India v. Srinivasa Chariar* (3) any bearing upon the question now raised.

(1) (1870) 13 Moo. I.A. 333.

(2) (1916) L.R. 44 I.A. 46.

(3) (1920) L.R. 48 I.A. 56.

Dunne K.C. and *Kenworthy Brown* for the respondent. The present contention is inconsistent with the finding of the Subordinate Judge that Totapalli was originally held under a grant from the zamindar of Peddapur. Under the Code of Civil Procedure, s. 100, the finding was binding in second appeal; it is also binding in this appeal: *Durga Choudhrain v. Jawahir Singh Choudhri* (1); *Nafar Chandra Pal v. Sukur*. (2) Further, the finding was correct. If the mansabdar had been in the position now alleged he would have applied for a permanent settlement in 1802. By the annexation any previously existing titles were nullified: *Vajesingji v. Secretary of State for India*. (3) As the effect of the permanent settlement Totapalli was a tenure held under Peddapur; the existence of a reversion is the test. Nothing which afterwards occurred affected the subinfeudation. The failure of the plaintiff to prove that the minerals were granted to him is fatal to his case: *Sashi Bhushan Misra v. Jyoti Prashad Singh* (4); *Raghunath Roy Marwari v. Raja of Jheria* (5); *Secretary of State for India v. Srinivasa Chariar*. (6)

De Gruyther K.C. in reply. The permanent settlement did not take away any pre-existing rights: *Collector of Trichinopoly v. Lekkamani*. (7)

March 15. The judgment of their Lordships was delivered by LORD TOMLIN. The appellant in this case, who is the plaintiff in the suit, and will be hereinafter referred to as the plaintiff, is appealing against a decree dated March 31, 1925, of the High Court of Judicature at Madras, whereby the plaintiff's suit was dismissed and the plaintiff was ordered to pay certain costs.

The plaintiff as successor in title of his father holds twenty-seven villages, formerly part of an estate known as the Totapalli estate situate in the Godaveri district in the Northern Circars of Madras. These villages were purchased in 1879 by the plaintiff's father from the then holder and mansabdar of the Totapalli estate.

(1) (1890) L.R. 17 I.A. 122.

(2) (1918) L.R. 45 I.A. 183.

(3) (1924) L.R. 51 I.A. 357.

(4) L.R. 44 I.A. 46.

(5) (1919) L.R. 46 I.A. 158.

(6) (1920) L.R. 48 I.A. 56.

(7) (1874) L.R. 1 I.A. 282.

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In the years 1913 and 1915 the tahsildar of Peddapur collected from tenants of the plaintiff in two of the twenty-seven villages royalties or penalties for the removal of gravel and stone from hills within the boundaries of such two villages. He did so on the footing that the underground rights in the villages belonged to the Government.

Thereupon the plaintiff launched in the Court of the District Munsif of Peddapur a suit against the defendant, the Secretary of State for India in Council, claiming a declaration of his title to the underground rights in his villages formerly part of the Totapalli estate. He also asked an injunction to restrain interference with his rights and a refund of the amount collected from his tenants. The defendant denied the title of the plaintiff to the underground rights, alleging that the Government retained the right to resume (i.e., to reassess) the Totapalli estate, and that the underground rights were therefore vested in the defendant respondent. The substantial issue between the parties is the title to the underground rights.

The mansabdar of the Totapalli estate admittedly transferred to the plaintiff's father in 1879 all his interest in the twenty-seven villages. It was open to the plaintiff to show either that the interest of the mansabdar transferred in 1879 included the underground rights or that the plaintiff's father or he himself subsequently acquired them. In fact, in the first instance, he framed his claim on the footing that the underground rights passed to his father in or about 1883 by reason of the Government having at that time resumed the villages and enfranchised them in favour of his father.

This point is raised by para. 3 of the plaintiff's filed plaint in the following terms: "The plaintiff is the owner of Nellipudi, Meraka Chamavaram and some other villages in the Totapalli estate as per the plaint schedule. The underground rights in the said villages had become absolutely vested in and been enjoyed by plaintiff and his predecessors in title and the said villages were purchased from the then mansabdar by plaintiff's father in or about 1879. They were subsequently resumed by Government and enfranchised

in plaintiff's father's favour and quit rent imposed on them."

As will be seen from the succeeding narrative, the plaintiff subsequently changed his ground more than once.

On December 18, 1916, the District Munsif pronounced judgment in the plaintiff's favour so far as his title to the underground rights was concerned, and gave him a declaration accordingly, but did not grant him any injunction, and rejected his claim for a refund of the royalties or penalties which had in fact been paid not by him but by his tenants. The District Munsif appears to have held that the alleged enfranchisement did not enlarge the appellant's rights, but that the title to the Totapalli estate rested upon an ancient grant, which had not been produced, and that by virtue of a general rule to the effect that the grantor must in the absence of evidence to the contrary be taken to have parted with all his rights, the underground rights had passed by the grant and were therefore vested in the plaintiff.

An appeal was taken to the Subordinate Judge who, on December 17, 1917, also pronounced judgment in the plaintiff's favour. He appears to have held that there was an original service grant of the estate, which must be presumed to have carried the underground rights, and further that the plaintiff was entitled to the underground rights by virtue of the alleged enfranchisement. He therefore confirmed the decree of the lower Court with the addition of an injunction to which he considered the plaintiff entitled.

The defendant appealed to the High Court of Judicature at Madras. On March 7, 1919, the Court set aside the decisions of the lower Courts. It remanded the suit to the District Munsif for readmission and retrial, and directed the trial of an additional issue—namely: "Whether the suit village in the hands of the plaintiff's predecessors was subject to a burden of service or was in lieu of wages for service?"

From the judgments delivered in the High Court it appears that the Court took the view that the Subordinate Judge had decided the case upon the basis that there had been an enfranchisement by the Government which carried the

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underground rights to the plaintiff's father, but that in fact what had taken place had not amounted to an enfranchisement at all. The learned judges however directed the trial of the further issue, because the plaintiff's counsel had presented to them an argument to the effect that apart from the alleged enfranchisement his client's predecessors in title had always held the estate subject to a burden of service and not merely in lieu of wages for service. This fact, if established, would (he had contended) lend strength to the plaintiff's claim to the underground rights. The suit was accordingly retired by the District Munsif. On June 21, 1920, he again gave judgment in the plaintiff's favour, holding that the Totapalli estate was held only burdened with service and was not held in lieu of wages for service, and that the underground rights were therefore in the plaintiff. The District Munsif's view seems to have been that the holding of the villages was first and the imposing of the burden of service subsequent.

On appeal the Subordinate Judge, on December 12, 1921, confirmed the District Munsif, holding that the estate was enjoyed under a grant from the zamindar of Peddapur, subject to the obligation of rendering some service and paying a quit rent, and that such a grant carried the underground rights.

The suit was again taken by the defendant to the High Court of Judicature at Madras. The appeal was, on May 1, 1925, allowed, the learned judges holding that in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

It is to be observed that in the High Court on the second appeal the plaintiff for the first time put forward a new contention that the mansabdar of the Totapalli estate was originally a chief in a position analogous to a paliagar in the south of the Presidency, and as such entitled to the underground rights. This contention was rejected by the learned judges of the High Court on the grounds that it had not been raised in the lower Courts, and that there was no evidence to show any similarity between the tenure of the Totapalli estate and that of an estate held by a paliagar.

It is against this judgment that the plaintiff now appeals.

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The history of the Totapalli estate prior to the early part of the nineteenth century is not free from obscurity. No grant of the estate has been produced. The material placed before the lower Courts consisted of (a) Mr. James Grant's Political Survey of the Northern Circars, written about 1785 and annexed to the Fifth Report of the Select Committee on the Affairs of the East India Company; (b) Morris's account of the Godaveri District, published in 1868 under Government authority; (c) The Godaveri Gazetteer, a Government publication of 1907; (d) the Government documents relating to the transactions of 1881-1883, which are printed at pp. 89-100 of the record; and (e) the extracts from the statement of a former mansabdar of Totapalli printed in the course of the report of the case of *Rajah Yanumula Venkayamah v. Rajah Yanumula Boochia Vankondora*.⁽¹⁾

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From this material certain facts emerge, as to which there is no dispute—namely: (1.) that in or about the year 1785 the mansabdar was paying a fixed annual sum to the zamindar of Peddapur, and was under an obligation to furnish him with a military force of 700 peons when called upon to do so; (2.) that some time prior to the end of the eighteenth century the zamindar resumed certain villages forming part of the estate to satisfy his claims in respect of the annual sum; (3.) that in 1802 there was a permanent settlement by the Government of Madras of the zamindari of Peddapur, and that the annual sum receivable by the zamindar from Totapalli was treated as an asset of the zamindar; (4.) that in 1847 the Government of Madras acquired the zamindari of Peddapur at a sale for arrears of revenue; (5.) that in 1859 the Government commuted the obligation of the mansabdar of Totapalli to supply 700 peons for an annual payment of 6500 rupees; (6.) that the mansabdar from time to time alienated certain other parts of the Totapalli estate as well as the twenty-seven villages alienated to the plaintiff's father in 1879; and (7.) that the Government's documents

(1) (1870) 13 Moo. I.A. 333.

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show that the Government regarded the Totapalli estate as a service inam and dealt with it on that footing in 1881 to 1883 by making a settlement in respect of it which was expressly stated not to amount to a permanent settlement or enfranchisement.

Mr. Grant, in his survey of 1785, describes Totapalli as a small hilly country and a region of tigers. The obscurity of its early history may in part be due to its lack of importance.

At any rate their Lordships are of opinion that there is a definite finding by the Subordinate Judge to the effect that the estate was originally held under a grant from the zamindar of Peddapur subject to a fixed annual rent and an obligation to provide a military force. After an examination of the materials placed before the lower Courts (in the course of which their Lordships saw a full copy of the statement of the Mansabdar, extracts from which are printed in 13 Moore's Indian Appeals, p. 333), their Lordships are of opinion that there was before the Subordinate Judge evidence upon which his finding of fact could have been based.

Before their Lordships it has been urged by the plaintiff that the mansabdars of Totapalli were originally independent chieftains not taking under any grant at all, and that the findings of fact arrived at by the Subordinate Judge should be reviewed and modified accordingly.

In their Lordships' opinion they have no jurisdiction in the circumstances of this case to embark upon any such review. Under the Civil Procedure Code no second appeal will lie except on the grounds specified in s. 100. Directly in point are the observations of Lord Macnaghten in *Mussummat Durga Choudhrain v. Jawahir Singh Choudhri* (1), in which he says: "It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be."

There remains then only the question whether the High Court of Judicature at Madras was right in holding that the

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underground rights did not pass in the absence of evidence of the inclusion of such rights in the grant found by the Subordinate Judge.

There was, in fact, no evidence that the grant included the underground rights or that the minerals had ever been worked by the mansabdars of Totapalli or by any of their alienees. The fact that minerals were in terms reserved in leases to tenants granted by the plaintiff and his father cannot in their Lordships' opinion be evidence that the underground rights passed from the zamindar of Peddapur under the original grant to the mansabdar of Totapalli.

The lower Courts based their conclusion that the underground rights passed by the original grant upon a presumption that in the absence of any evidence as to the terms of the grant the grantor passed all that he had to the grantees.

In their Lordships' opinion no such presumption is admissible. Such a presumption would be contrary to many decisions of their Lordships' Board in which it has been from time to time pointed out that the rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant.

The principle to be applied to the present case is in their Lordships' judgment to be found stated by Lord Buckmaster in *Sashi Bhushan Misra v. Jyoti Prashad Singh Deo*(1), where, referring to earlier decisions, he says: "These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

In the result therefore their Lordships are of opinion that the judgment of the High Court at Madras was right and that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Douglas Grant & Dold.*

Solicitor for respondent: *Solicitor, India Office.*

J.C.* FAIZULLAH KHAN AND ANOTHER
 1929 (PLAINTIFFS) } APPELLANTS;

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AND

MAULADAD KHAN AND OTHERS
 (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
 COMMISSIONER, NORTH-WEST FRONTIER PROVINCE.

Court Fees—Suit for Accounts—Appeal—Cross-claims—Value of Relief sought—Discretion of Court where Valuation Insufficient—Code of Civil Procedure Act (V. of 1908), s. 149—Court Fees Act (VII. of 1870), s. 7 (iv.) (f).

On taking accounts in a partnership suit a decree was made that Rs.19,991 were due from the plaintiffs to the first defendant. The plaintiffs, who had valued their suit at Rs.3000, appealed within the time limited, praying that the decree be set aside and that a decree be made for such an amount as might be found due to them. By their memorandum of appeal they valued the appeal at Rs.19,991, and paid Court fees accordingly. The Appellate Court remanded the matter for a retrial, but ordered that the plaintiffs should not have a decree for any sum which might be found due to them, since in their view the Court fees paid did not cover that relief, and to that extent the appeal was then barred by limitation:—

Held, that the memorandum of appeal correctly stated "the amount at which relief is sought" within the Court Fees Act, 1870, s. 7 (iv.) (f), and the fees paid entitled the plaintiffs to claim a decree if any sum should be found to be due to them: but that even if that was not so the Appellate Court should have exercised its power under the Code of Civil Procedure, 1908, s. 149, to allow a further payment, and should not have precluded the plaintiffs from the full relief which they sought.

Decree reversed.

CONSOLIDATED APPEALS (Nos. 19 and 20 of 1928) from an order of the Court of the Judicial Commissioner of the North-West Frontier Province (May 7, 1925) setting aside a decree of the Honorary Subordinate Judge of Dara Ismail Khan (March 24, 1924).

The decree of the Court of first instance was a final decree made on taking accounts of a partnership. By the order

* Present: LORD SHAW, LORD TOMLIN, and SIR LANCELOT SANDERSON.

now appealed from the Court of the Judicial Commissioner set aside the decree and remanded the case for a fresh trial on the merits, but ordered that the present appellants should not have a decree in their favour even if anything were found to be due to them respectively from the first respondent on taking the accounts. The present appeals were limited to the latter part of the above order, which resulted from the learned Judicial Commissioner's view that the memorandum of appeal filed by the present appellants was insufficiently stamped to entitle them to more than a reversal of the decree against them, and that as the time for appealing had then expired the appeals were barred by limitation so far as they claimed further relief.

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1929. Feb. 25. *De Gruyther K.C.* and *Parikh* for the appellants. The Court Fees Act, 1870, s. 7 (iv.) (f) contains the provision applicable. The fees paid were sufficient under that provision to entitle the plaintiffs to the full relief they sought. The suit being for an account, by s. 11 fees in respect of any sum by which the amount found due exceeded the valuation could, be paid before execution. But even if the fees paid were inadequate, the Court had a discretion under s. 149 of the Code of Civil Procedure to allow at any stage such further payment as was right. That discretion should have been exercised. There was no ground for holding that any of the relief sought was barred by limitation.

Schiller K.C. and *W. Wallach* for the first respondent. So far as the plaintiff sought to set aside the decree against him the value of the relief sought was correct. It follows that in respect of the further relief he sought—namely, a decree in his favour—there was no valuation at all. To that extent, therefore, the memorandum did not comply with s. 4, and was a nullity. Both s. 11 of the Act and s. 149 of the Code apply only where there is an insufficient valuation, not where there is no valuation. But even if s. 149 applies, the Court must be taken to have exercised its discretion thereunder, and this being a matter of procedure the Board will not interfere.

J. C. March 15. The judgment of their Lordships was delivered by
 1929 LORD SHAW. This is a consolidated appeal from an order
 FAIZULLAH dated May 7, 1925, in the Court of the Judicial Commissioner
 KHAN of the North-West Frontier Province, Peshawar, which set
 v. aside a decree of the Honorary Subordinate Judge of Dera
 MAULADAD Khan dated March 24, 1924.

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Stated generally, the case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a partnership of a firm of contractors for supply and transport and military works. The partnership is now dissolved.

In the suit, brought on March 29, 1923, Faizullah Khan and Sherdad Khan, plaintiffs and appellants, valued their suit at Rs.3000 for the purpose of Court fees, and asked for a rendering of accounts and a decree for Rs.3000 with the statement "if more than Rs.3000 be found due to the plaintiffs they will pay an additional Court fee." In his pleas Mauladad Khan, the first defendant, asked for a decree in his own favour for Rs.29,000, and he challenged the shares as given by the plaintiffs and asked for dismissal of their suit.

As stated in the appellants' case: The suit was tried by the Honorary Subordinate Judge, First Class, Dera Ismail Khan, who on October 22, 1923, passed a preliminary decree determining the respective shares of the parties in the partnership, and ordering accounts to be taken according to the directions given by him. There was no appeal against this decree, which has therefore become binding on the parties.

On March 24, 1924, the Honorary Subordinate Judge passed a final decree with costs and interest. Under that decree Rs.19,991 were declared to be due to Mauladad Khan, the first defendant, by plaintiffs-appellants. No sum was found due to the appellants under their claim for Rs.3000.

This judgment was appealed from by both parties. The position of the plaintiffs still remained the same—namely, that they challenged the decree against them for over Rs.19,000, and maintained that the sum in whole or in part should be disallowed, and that their own claim of Rs.3000 or

less or more should be granted in their favour. It is plain that any substantial inversion of liability under the respective decrees would result in all likelihood in the sums awarded on appeal to both parties being much within Rs.19,000 awarded to one. In these circumstances the appeal was taken, and the claim in the appeal to the Court of the Judicial Commissioner was expressly as follows: "Claim in Appeal.—For reversal of the decree against the appellants and for granting a decree in their favour for such of that amount as may be found due. Value for purposes of Court fee of Appeal, Rs.19,991."

This appeal was duly received, and the copy of the office indorsement upon it states: "Presented by Lala Sham Das, agent of appellants. Is within time. The Court fee is correct and necessary copies are attached."

It is only necessary to observe that this applied to a valuation of the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour.

The Court fee due upon the appeal valued as an ~~Entire~~ ^{Entire} as thus stated was Rs.975, and that was duly paid.

Their Lordships find no reason for treating that payment as upon either an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs.975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach, and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs.3000 on the other.

Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal. A reference may be added to the results which would have followed from the course adopted below.

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The Judicial Commissioner found that a remand should only be granted as to the Rs.19,000. The result of this would be that although accounts were taken on the remand and the Rs.19,000 was largely reduced and the sum of Rs.3000 or more or less than that sum were found due to the plaintiffs, no remedy could be granted for the latter event, because according to the judgment only a sectional fee and not a fee covering all the relief sought had been paid, and therefore one item and claim for Rs.3000 had finally dropped out of the case. The learned counsel for the respondents frankly argued the case on this footing, declaring that the appeal in so far as it could be held to refer to the Rs.3000 had gone, and must be dismissed as a nullity. For the reasons stated, their Lordships cannot accept this argument; the extraordinary consequences figured accordingly do not arise. But upon a second point—an important point of procedure—their Lordships think it right to add the following: Granted that a fee had been paid which was insufficient in amount what was the duty of the Court?

Such a case as the present appears to be pre-eminently one for the exercise by the judicial authority of the discretion for giving an opportunity to add to the amount lodged the extra Rs.70 or Rs.80 required or for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained. The provisions of the Court Fees Act which are in place (Act VII. of 1870), s. 7 (iv.) (f), for "accounts," . . . "according to the amount at which the relief is sought, is valued in the plaint or memorandum of appeal." Even, accordingly, if the mistake insisted on had been made, this, in the opinion of the Board, was a plain case for rectifying that situation if it could be done, and the Courts are fortunately furnished with an easy method of doing so.

Sect. 149 of the Code of Civil Procedure, 1908, provides: "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court fees has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable,

to pay the whole or part, as the case may be, of such Court fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

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It will be observed that that discretion extends to the whole or any part of any fee prescribed, and can be exercised at any stage in the case, while finally, upon the extra payment being made, then the document is to have the same effect as if it had been paid in the first instance.

This also answers the argument presented under the Limitation Act. The dates are as follows: The decree of the Subordinate Judge was dated March 24, 1924, the first appeal was on May 27 and the second on June 2, bringing before the Appeal Court the respective claims of each suitor. The time for limitation of the appeal is 90 days, and it is thus seen that both appeals were within time. They were not a nullity. On the contrary, they were documents duly presented to and accepted by the Court, and as to the fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document—namely, the memorandum of appeal—stands good from its date. The appeals are accordingly not time barred.

Their Lordships will humbly advise His Majesty to allow this appeal, to set aside the order of the Judicial Commissioner dated May 7, 1925, and to remit the case to the Court of the Subordinate Judge for a fresh trial and decision on the merits. The appellants will have the costs incurred in the Court of the Judicial Commissioner and of this appeal. The costs incurred in the Court of the Subordinate Judge will abide the result of the new trial.

Solicitors for appellants: *Stanley Johnson & Allen.*

Solicitors for first respondent: *T. L. Wilson & Co.*

J.C.* P R A F U L L A N A T H T A G O R E }
 1929 (DEFENDANT) } APPELLANT;

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AND

SATYA BHUSAN DAS (PLAINTIFF) AND }
 OTHERS } RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Bengal Tenancy—Sale for Arrears of Rent—Annulment of Incumbrances—Separate Tenures included in one Suit—Rights of Holder of Sub-tenure—Sub-tenure held by Judgment-debtor—Bengal Tenancy Act (VIII. of 1885), ss. 167, 170.

A sub-tenure created by the holder of a tenure under the Bengal Tenancy Act, 1885, cannot validly be annulled under s. 167 by a purchaser at a sale in execution of a decree for rent unless the tenure has been attached and sold separately from any other tenure, so that the sub-tenure holder can redeem it pursuant to s. 170. But if the judgment-debtor himself holds a sub-tenure and has not objected that the execution proceedings have treated separate tenures jointly, neither he nor those claiming from him can complain of an annulment of that sub-tenure.

The Code of Civil Procedure permits a plaintiff to join in one suit claims against a defendant in respect of more than one tenure, and there appears to be nothing in the Code or in the Bengal Tenancy Act to prevent the resulting decree from being moulded so as to apply distributively to the separate tenures; but it was not necessary so to decide, as it did not appear in the present case, that there had been separate execution proceedings in respect of the separate tenures.

Decree of the High Court affirmed.

CONSOLIDATED CROSS-APPEALS (Nos. 132 and 133 of 1924) from two decrees of the High Court (July 18, 1923) varying decrees of the Subordinate Judge of Backergunj (December 22, 1919).

The appeal raised questions as to the division of tenures under the Bengal Tenancy Act, 1885, and as to the right under that Act of a purchaser at a sale in execution of a decree for arrears of rent to annul inferior tenures.

The first respondent above named brought two suits against the appellant zamindar claiming fifty-six sub-tenures

* Present: LORD SHAW, LORD CARSON, LORD ATKIN, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

of land in his zamindari of Nasipur; eleven he claimed as having been purchased by his father in 1905 at a sale in execution of a mortgage decree, and the remaining forty-five as purchased by him in 1910 and 1912 at sales in execution of personal decrees. The plaintiff by his plaint admitted that the zamindar, as purchaser at a sale in 1906 in execution of a decree for arrears, had purported to annul, under s. 167, the sub-tenures claimed; but he alleged that the tenure in respect of which the decree had been obtained had been divided into six separate tenures prior to the creation of the sub-tenures; he contended that the annulment consequently was invalid.

The facts are fully stated in the judgment of the Judicial Committee.

The Subordinate Judge found that the original tenure had been divided into six separate tenures, and made a decree in favour of the plaintiff except as to two sub-tenures to which the plaintiff failed to establish his title.

On appeal to the High Court the learned judges (Chatterjea and Panton J.J.) agreed with the finding that the original tenure had been divided. They held that the rent decree and execution proceedings, though binding upon the separate tenure holders, did not enable the auction purchaser to annul the sub-tenures under s. 167 of the Bengal Tenancy Act. In so holding they applied *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1) and cases following that decision, the most recent cited being *Bipra Das Dey v. Rajaram Bandopadhyay* (2); *Mulluk Chand Dass v. Satish Chandra Das* (3); and *Rash Mohini v. Debendra Nath Sinha*. (4)

Upon proceedings in review the rights as to the sub-tenures purchased by the plaintiff in 1910 and 1912, which had not been dealt with in the original judgment, were considered. These sub-tenures at the date of the decree and subsequent sale and annulment were held by the judgment debtors. The learned judges held that the judgment debtors, not having

(1) (1907) I.L.R. 34 C. 298.

(2) (1909) 13 C.W.N. 650.

(3) (1909) 14 C.W.N. 335.

(4) (1911) 16 C.W.N. 395.

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objected when the sale took place or when notice of annulment was served could not complain, and that the plaintiff who claimed through them was in no better position.

In the result the High Court allowed the appeal as to the sub-tenures bought in 1911 and 1912, and otherwise affirmed it.

1928 Dec. 10, 11, 13, 14, 17, 18. *Dunne K.C.* and *E. B. Raikes* for the defendant. The evidence did not establish that the original tenure had been divided. On that issue evidence was wrongly admitted. No division made in writing by the consent of the landlord, as required by s. 88 of the Bengal Tenancy Act, 1885, was proved. But even if there had been a division the defendant validly annulled the sub-tenures. Though a decree for arrears is in respect of different tenures it can be treated for the purposes of ch. XIV. of the Act as applying to each tenure severally, the incumbrancers under each having the right given by s. 170 to release the particular tenure under which he holds. The execution proceedings were upon that basis. *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1), and the later cases which merely followed that decision, were wrongly decided.

De Gruyther K.C. and *H. N. Sen* for the respondents. Both Courts in India found that there were six separate tenures. That conclusion is right even if the evidence objected to is excluded. It was established that separate tenures existed before the permanent settlement. The respondents therefore need not show that s. 88 of the Act, or the similar provision of earlier legislation, was complied with. *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1) was rightly decided, and had been frequently followed in India. The respondents are entitled to succeed on their cross-appeal on the ground that the attachment and sale were altogether inoperative under the Act as a foundation for the annulment.

Dunne K.C. replied.

March 19. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the High Court at Fort William in Bengal in a suit brought by the plaintiff to establish his right to certain under-tenures of land in the village of Dashmina against the zamindar of Nasirpur in whose zamindari the village lies.

The rights of the parties involve an examination of the creation of tenures and sub-tenures from before 1799 and of the complicated devolution of title in the respective holders since that date. It is also necessary to consider the provisions of the Bengal Tenancy Act, 1885, relating to the power of an auction purchaser to annul incumbrances, powers which the zamindar says that he has exercised so as to defeat any claim by the plaintiff.

Their Lordships have the assistance of careful and accurate judgments in the Courts below in which the facts are fully surveyed, and it will be sufficient for the purpose of presenting the issues that arise before the Board to state shortly the principal landmarks in the history of the title. Before 1799 the defendants' predecessor the then zamindar of Nasirpur had created a jumba (1) tenure, which included the village in question, known as the Taluk Shib Deb Sen. By the time of the permanent settlement the Sen family held the property in five branches in five equal shares of 3 annas 4 gundas each, and one-fifth of the rent was paid separately by each shareholder. Other sub-divisions of the shares followed which it is unnecessary here to specify. Before 1835 the zamindar had reacquired a 4 anna share in the whole tenure. In 1852 the zamindar created in favour of two persons Kader and Saker a putni tenure superior to the jumba tenure over the whole property and put them into possession of the 4 anna share. They thus held the 4 anna share in possession and were superior landlords under the zamindar of the remaining 12 anna share still outstanding in the Sen family. In 1861 Kader and Saker the patnidars enforced their right to rent against the holders of the 12 anna share, put the property up to sale and bought it, thus acquiring

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(1) *Sic in record: quaere "jimba" throughout,*

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the interest in the whole. In 1862, however, the zamindar on his part enforcing his right to rent against Kader and Saker, put the whole patni tenure up to sale, and bought it. The 4 anna share thus reverted to him in possession, the 12 anna share of the jumba tenure being still outstanding. In 1871 the zamindar leased by pottah the 4 anna share to Kader and Saker. Meantime in natural course numerous sub-tenures had been created. In 1892 the son and successor of Kader granted to the father of the plaintiff a mortgage of eleven such sub-tenures in the 12 anna share. In 1901 the plaintiff's father obtained a mortgage decree against the mortgagor, and in 1905, under the decree the plaintiff, his father's successor in title, had the sub-tenures sold and purchased them. Having thus established the plaintiff as the owner of eleven sub-tenures we now return to the main title. In 1905 the zamindar sued Kader and Saker for arrears of rent, both on the 12 anna share under the jumba taluk, and on the 4 anna share under the pottah taluk. He obtained decrees, had the property put up for sale in 1906 and himself purchased. He gave notices to annul incumbrances in pursuance of the powers given by the Bengal Tenancy Act. He therefore claims now to hold the whole property free of all sub-tenures, and if he is right he has succeeded in eliminating the plaintiff and his eleven sub-tenures. The plaintiff, on the other hand, claims that not only his eleven sub-tenures are still in existence, but also further sub-tenures which he acquired after the zamindar's purchase in 1906. For in 1908 the plaintiff sued for the balance of the before mentioned mortgage; and obtained a personal decree against the mortgagor. In execution of that decree he procured the sale of certain other sub-tenures as the property of the judgment debtor, and bought them in 1910 and 1912.

The Subordinate Judge found in favour of the plaintiff substantially on the whole of his claim. The High Court found in favour of the plaintiff in respect of the eleven sub-tenures bought in 1905; but decided against him in respect of the sub-tenures bought in 1908 and 1910 except in respect

of two or three in which it was held that the plaintiff could rely on the rights of superior sub-tenure holders to him acquired before the zamindar's purchase in 1906. We are thus brought to the issues before the Board.

The plaintiff contends that before 1905 the original jumba tenure Shib Deb Sen had been divided into separate tenures with the consent of the zamindar. The zamindar, however, as is contended, in his suits in 1905 sued as for one single tenure and obtained annulment of incumbrances as though the sub-tenures were under one single tenure. In this way the sub-tenures holders lost the right to redeem the separate divided tenure under which they held and were exposed to the much heavier liability of redeeming the whole. This, it is said, is contrary to the provisions of the Bengal Tenancy Act. The zamindar, on the other hand, says that the original tenure never was divided. If this is so, there is no ground for complaint; the plaintiff fails. The zamindar further contends that even if the tenure had been divided his proceedings were in order, and the sub-tenure holders could have exercised their rights under the Bengal Tenancy Act to redeem the separate divided tenures. The Courts below have decided against the zamindar on both his contentions.

The first question, therefore, is whether the original jumba tenure was ever divided into separate tenures as between the zamindar and the tenant. As to this it has to be remembered that by the course of legislation ever since the Bengal Regulations of 1799 such division can only validly take place with the consent of the superior landlord in writing. Whether a tenure has been divided or not is a question mainly of fact in each case. In view of the prevailing joint ownership of property by both landlord and tenant, and the prevailing system of partition, it is obvious that either party may accept the partition made by the others without necessarily intending to alter their legal relations *inter se*. Thus the separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure: and similarly the landlord may collect separate shares of the rent from separate shareholders in

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the tenant family without the legal position being altered. The question whether a sub-division has been made is really the question whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem. In the present case a series of facts extending over a century were laid before the Court, some pointing in one direction, some in the other. The effect of the evidence is thus summarized by the learned Subordinate Judge in a passage adopted by the High Court: "Thus we find that rents for the several interests were separately realised both amicably and by suits for over a century, that separate rent receipts were granted for the separate parts, that the several interests were treated all along except indirectly in the last suit No. 48, as specific tenures in the names of the respective holders with specific sadar jumma or annual liabilities for rent and that for purposes of mowzahwar returns, cess. returns execution of degrees record of rights and transfers they were also treated as separate tenures. We have also the fact that the lands of the respective tenures are not entirely joint, and that there are several under-tenures, including some owned by the Tagores themselves which are exclusively held under one or other of the said interests."

Their Lordships are of opinion that there is evidence to support these findings and they see no reason to doubt that in substance they are correct, and that they justify the view expressed in both Courts that the original tenure had been at a very early time divided into separate tenures. At what time, it appears to their Lordships unnecessary to determine. If before 1799 the consent of the landlord in writing was unnecessary: if after 1799 there is ample evidence to support the finding of the Subordinate Judge that there was a written consent. The finding therefore of the High Court affirming the finding of the Subordinate Judge on this matter must stand. In coming to this conclusion their Lordships must not be thought to express assent to the view taken in the High Court as to the admissibility of the judgment of Mr. Kemp, the District Judge in 1859, in a suit between

Kader and Saker, the then patnidars against a sub-tenure holder on the ground that it tended to show the probability of a statement made by a witness called at the trial. It is sufficient to indicate their Lordships' opinion that this reasoning is at least open to doubt, for the judgment in question is only a small feature of the evidence and does not appear materially to have affected the findings for which there is ample other support.

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On the footing therefore that there were in existence several tenures in place of the original single tenure the question arises whether the zamindar took appropriate steps to annul the sub-tenures. This depends upon the construction of ch. XIV. of the Bengal Tenancy Act, 1885, entitled "Sale for arrears under decree" and comprising ss. 159-177 inclusive of the Act. Summarizing the sections the chapter provides in s. 162 that "when a decree has been passed for an arrear of rent due for a tenure or holding" the decree-holder may apply for sale producing a statement showing the village in which the land comprised in the tenure or holding is situate and the yearly rent payable from the same: the land may then be proclaimed and attached: s. 163; the tenure or holding shall first be put up to auction subject to incumbrances which by s. 161 include sub-tenures; and if the bidding does not reach a sum equivalent to the amount of the decree and costs then at the request of the decree holder the land shall be put up for sale with power to the purchaser to avoid incumbrances: s. 165. The purchaser at such a sale may within a year from the sale avoid incumbrances by presenting an application to the collector requesting him to serve on the incumbrancer a notice of annulment: and from the date of such service the incumbrance is annulled: s. 167. By the provisions of s. 170, when an order for a sale of a tenure or holding in execution of a decree for arrears due thereon has been made, the tenure shall not be released from attachment unless before it is knocked down to the auction purchaser the amount of the decree and costs is paid into Court: and any person having in the tenure any interest voidable on the sale may pay money into Court.

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It seems to their Lordships clear that the provisions of the Act are devised for the purpose of protecting the persons interested in each separate tenure put up for sale. A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure holder to get protection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connection. This construction of the Act has been adopted in numerous decisions of the Courts in India and their Lordships consider it to be correct. It follows that the defendant must fail in resisting the plaintiff's claim unless he can show that his proceedings were taken in respect of separate tenures and gave the sub-tenure holders the protection to which their Lordships have already held they were entitled.

There can be no doubt that the Code of Civil Procedure permits a plaintiff to join in one suit claims against a defendant in respect of more than one tenure. It appears to have been the view of the High Court following other decisions in India to the like effect that such a suit can never result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. Their Lordships are inclined to think that this goes too far. If the original suit can be brought against a holder in respect of all his separate holdings, there appears to be nothing in the Code of Civil Procedure or in the Bengal Tenancy Act to prevent the consequent decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. It would be a misfortune to find a system of procedure so rigid as to lead to an illogical and inconvenient result: and their Lordships are not prepared to hold that this defect exists. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be

redeemed separately by the incumbrancers of such separate part pursuant to s. 170. In the present case while there is sufficient in the zamindar's plaints in 1905 to support a claim in respect of several tenures their Lordships have not been provided with the documents which record the subsequent proceedings for sale and annulment so as to enable them to conclude that the subsequent proceedings maintained the distribution into several tenures. Such documents as are before them rather lead to the opposite conclusion.

Their Lordships are therefore unable to disagree with the view of the Courts below that the proceedings taken by the zamindar in 1905 and the following years were ineffective to annul the eleven incumbrances of which the plaintiff was then the holder. As to the sub-tenures acquired by the plaintiff after the zamindar had recourse to his rights their Lordships are in agreement with the reasons given by the High Court on review for holding that the plaintiff cannot now make a claim to these, and they confirm the decision given against the plaintiff on this point. They also see no reason to differ from the conclusion of the High Court in respect of the (two) tenures excepted in favour of the plaintiff. For these reasons their Lordships are of opinion that the appeal and cross-appeal should be dismissed with costs, and they will humbly advise his Majesty accordingly.

Solicitors for defendant-appellant: *T. L. Wilson & Co.*

Solicitors for plaintiff-respondent: *W. W. Box & Co.*

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 1929 (DEFENDANTS) } APPELLANTS;
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SUBRAMANYA MUDALIYAR (PLAINTIFF) }
 AND OTHERS } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Madras Tenancy—Right of Permanent Occupancy—Burden of Proof—Long continued Possession at uniform Rent—Alienations—Purchase of Kudivaram.

It is well established that those claiming a right of permanent occupancy must prove that it exists by custom, contract or title, or possibly by other means.

In a suit by a ryotwari pattadar claiming partition of his undivided half share in an estate, the defendants contended that they had a right of permanent occupancy as to certain well-irrigated lands and land under palmyra trees, and that consequently those lands should be excluded from the partition:—

Held, that the defendants, who proved that they had been in undisturbed possession of some of the land for a long period at a more or less uniform rent, and that at a comparatively recent date they had made alienations not of such a kind as ordinarily would be brought to the notice of the pattadar, had not discharged the burden of proof upon them; the fact that some of the defendants had purchased the kudivaram militated against their claim.

Seturatnam Aiyar v. Venkatachala Gounden (1919) L. R. 47 I. A. 76 and *Chidambara Sivaprakasa Pandara v. Veerama Reddi* (1922) L. R. 49 I. A. 286 distinguished on the facts.

APPEAL (No. 10 of 1927) from a decree of the High Court (October 15, 1924) varying a decree of the Subordinate Judge of Tinnevelly.

The first respondent was the owner by purchase of the pattadar rights in an undivided moiety of certain lands in a village in the Madras Presidency. He brought the present suit claiming a partition. The appellants were, or claimed through, persons who since 1857 or earlier had been in possession. By their written statement they alleged that as to part of the land they had a permanent right of occupancy, and that consequently it should be excluded

*Present: LORD CARSON, LORD SALVESEN, and SIR GEORGE LOWNDES.

from the partition. The question upon the present appeal was whether the appellants had the right they claimed.

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The facts of the case appear from the judgment of the Judicial Committee.

The High Court (Wallis C.J. and Sadasiva Ayyar J.) held that the burden of proof was upon the appellants and that they had not discharged it. The decree of the Subordinate Judge was varied accordingly.

1929. March 7, 8. *Dunne K.C.* and *E. B. Raikes* for the appellants.

De Gruyther K.C. and *Dube* for the first respondent.

March 19. The judgment of their Lordships was delivered by

LORD SALVESEN. This is an appeal from a judgment and decree dated October 15, 1920, of the High Court of Judicature at Madras, which varied a judgment and decree dated December 21, 1917, of the Subordinate Judge of Tinnevelly.

The appellants were defendants in a suit which was raised at the instance of the plaintiff-respondent for a partition of his one-half share of certain lands situate in what is called the chinna pannai division of the village of Aryanarkulam in the Tinnevelly district. By alienations and purchases which are not now disputed, the first respondent is the owner of a one-half share of the chinna pannai; and the ryotwari settlement having been made by the Government with his predecessors in title, he is at present ryotwari pattadar of one-half undivided share of this estate. The earliest document of title is dated 1857 and refers back to a state of possession in 1851, but it is probable that the settlement took place at an earlier date. Even at that time the land was described as belonging to three classes: rain-fed lands, dry lands, and lands which were then irrigated by means of wells but had been formerly dry; and the wells were at least of two classes, samudayam wells—that is, wells common to the three pannais, of which the respondent now holds one-half share of the chinna pannai and other wells, some of which are probably

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named after persons through whom the appellants claim, and may be assumed to have been sunk by the cultivating occupiers. It appears also that palmyra trees had been planted, some by the owners and some by the cultivators. It is these lands, irrigated by wells, and the palmyras or garden lands, which alone are in dispute in the present suit, which is one for partition between the appellants and the said respondent of the properties comprised within the chinna pannai above referred to.

In the statement made on their behalf, the appellants admitted that the respondent's predecessors in title had been regularly receiving tirwa swamibhogan for his share of the lands. Tirwa is the share of the rents payable to Government, and swamibhogan the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax. In statement No. 11 they raised no objection to a division being effected in respect of the dry and rain-fed lands specified in schedule No. 3, but they maintained that the well irrigated lands and palmyras should be excluded from the partition on the ground that they had acquired permanent rights of occupancy in the same, subject to the payment of a fixed rate of Rs.4-6-0 for punjas lands irrigated with water obtained from old wells, and Rs.2-3-0 per acre for punjas lands irrigated with water from new wells and pies four per palmyra. Some of these new wells, it appears from the evidence, were of comparatively recent date, but no distinction is made between the lands watered by these wells and those which were watered by wells of older date. In respect to all of them the appellants claimed that they were permanent tenants who had acquired by long occupation the kudivaram of these lands, subject only to the payment of a fixed annual return at the rates above mentioned.

Disputes of this kind have frequently come before the Courts in India, and the principle upon which they fall to be decided has now been conclusively fixed by two judgments of this Board. In the earlier of these, *Seturatnam Aiyar v. Venkatachala Gounden* (1), the long contested dispute as to

the burden of proof was dealt with in the judgment of the Board which was delivered by Sir Lawrence Jenkins: "The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adopt the language of s. 101 of the Indian Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognized in the series of Madras decisions cited in argument, and is, in their Lordships' opinion, not open to doubt."

In the latest case, *Nainapillai Marakayar v. Ramanathan Chettiar* (1), this view was expressly reaffirmed.

The judgment of the Subordinate Judge in the present case is vitiated by the fact that he misapprehended the proper incidence of the burden of proof, his judgment having been delivered before *Seturatnam Aiyar v. Venkatachala Gounden* (2) above referred to had been decided in the Privy Council.

The question, then, in the present case is whether on the evidence the appellants have established the permanent occupancy rights which they claim. In the case last mentioned the High Court had held that the appellants in that case had satisfied the onus of proof which in the first instance lay upon them, and their Lordships of the Privy Council saw no reason to disturb the inference which they had drawn from the facts proved. A similar result was arrived at in the case of *Chidambara Sivaprakasa Pandara Samadigal v. Veerama Reddi* (3), but in *Nainapillai's* (1) appeal the inference from the facts there proved was to the opposite effect.

In the present case the judges of the High Court have very carefully examined all the evidence and have reached a result unfavourable to the appellants. It would serve little

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(1) (1923) L. R. 51 I. A. 83. (2) (1919) L. R. 47 I.A. 76.
(3) (1922) L. R. 49 I. A. 286.

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purpose to go through the evidence which has already been dealt with in detail by these learned judges, seeing that the accuracy of their statement of facts and the soundness of their reasoning has not been successfully criticized. It is sufficient to point out that the facts in the other two cases, 47 Indian Appeals and 49 Indian Appeals, were very different from those which the appellants have been able to prove here. In the former case it was found to be established as a fact that the possession of the occupancy tenants had been immemorial and, what is perhaps more important, that at the inception of the relations between the owner and the tenants, the latter had possessed occupancy rights. In the latter case the tenants succeeded in showing that they had been dealing with the property as their own for at least a hundred years. They had also shown that they had received compensation from the Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence had been found to be mostly false and fabricated. No such facts have been established in the present case.

To use the language of Sir Lawrence Jenkins, "permanence is not a universal and integral incident of an under ryot's holding. If claimed, it must be established. This may be done by proving custom, contract or a title, and possibly by other means." In the present case the appellants have succeeded in showing little else than that they have remained in undisturbed possession of some of the land in question for a long period at a more or less uniform rent, but they have not attempted to prove any custom upon which they could found, and the attempt which they made to prove a contract with regard to the lands in which new wells were sunk, under which they were to be allowed to occupy these on a reduced rate of rent as compared with the lands on which the old wells were situate, has completely failed. The alienations on which they found and which, if they had been made over a long period, would have been valuable evidence in establishing the right which they claim, all turn out to be of comparatively recent date, and not of such a kind as would ordinarily be brought to the notice of the pattadar, for they

do not seem in most cases to have involved any change of tenancy.

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There is also one point on which one of the learned judges of the High Court relies, and which does not appear to have been present in any of the previous cases—namely, that in the half of the chinna pannai which is not claimed by the respondent some of the appellants actually acquired the kudivaram of the land. This, while not conclusive, as it might have been done by way of excessive caution, militates against the claim which they are now making. A cultivator who has acquired permanent rights of occupancy may purchase the melvaram of the lands so as to become the absolute proprietor, but if he considers himself to be the owner of the kudivaram it is not likely that he would expressly purchase the latter without some indication that he was only doing so to avoid disputes. The present suit is not an action of ejection, but is brought to establish that the plaintiff-respondent is entitled to have all the lands within his title partitioned on the footing that the appellants as a community of cultivators have not acquired the permanent rights of occupancy which they claim. Their Lordships express no opinion as to the terms on which ejection of any individual occupier may be sanctioned by the Court if and when such a suit is brought.

Their Lordships have therefore come to the conclusion not merely that there are no sufficient grounds for disturbing the inferences which the High Court have drawn from the facts proved before them, but they agree with them that these were the proper inferences to be drawn.

They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for first respondent: *Douglas Grant & Dold.*

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 April 15. AND
 HABIBUR RAHMAN AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Mahomedan Law—Widow's Dower—Construction of Decree—Charge on Husband's Estate.

The widow of a Shia Mahomedan sued his sole heir and persons interested in alienations made by him, claiming that the alienations were invalid, for a decree for a named sum as her dower, and to recover that sum from the alienated properties. She obtained a decree declaring the amount due to her, and that the properties "be treated as the properties" of the deceased "from which the plaintiff is entitled to recover the decreed amount." After the decree the heir sold two of the properties to purchasers who knew of the decree:—

Held, that the decree upon its true construction created a charge upon the properties for the dower debt, and that the purchasers took subject to that charge.

Decree of the High Court reversed.

APPEAL (No. 45 of 1927) from a decree of the High Court (March 19, 1926) reversing an order of the Subordinate Judge of Patna (June 23, 1925).

The sole question upon the appeal was whether a decree of January 31, 1918, created a charge upon the estate of a deceased Shia Mahomedan in respect of the dower due to his widow.

In execution proceedings the Subordinate Judge held that the decree in question had that effect, but the High Court (Kulwant Sahay and Ross JJ.) held to the contrary.

The facts and the view of the High Court appear from the judgment of the Judicial Committee.

1929. March 8, 11. *Dube* for the appellants. Upon the true construction of the decree of 1918, and having regard to the plaint and issues, the decree created a charge upon the properties in respect of the dower. In that respect its terms are at least as clear as the decree considered in *Bazayet*

* Present: LORD CARSON, LORD SALVESEN, and SIR GEORGE LOWNDES.

Hossein v. Dooli Chund (1), which was held to constitute a charge. In the first of the appeals there reported the alienation took place before the decree, and consequently the widow failed. In the second the alienation having been during, and with knowledge of, the suit, the widow succeeded on the principle of *lis pendens*. That necessarily involved that a charge was created: see also observation of Sir Montague Smith during the argument. Here the sale was after the decree and with knowledge of it, and the purchasers therefore took subject to the charge.

Dunne K.C. and *Abdul Majid* for the respondents. It is clear from the decision already cited and from *Hamira Bibi v. Zubaida Bibi* (2) that apart from an express charge the widow was merely an unsecured creditor. Her suit was not for the purpose of obtaining a charge, but to invalidate the alienations as fraudulent against creditors so that the properties should form part of the estate available to all the creditors. The decree did not create a charge, and the language used does not imply that one was intended to be created. The wording differs materially from the decree considered in *Bazayet Hossein v. Dooli Chund*. (1)

Dube replied.

April 15. The judgment of their Lordships was delivered by

SIR GEORGE LOWNDES. The appellants are the representatives of Izatunnissa Begam, the widow of one Azhar Husain, a Shia Mahomedan, who died in 1916. His sole heir according to the Shia law was his sister Ahmadi Begam. Izatunnissa Begam was entitled on her husband's death to a dower of Rs.40,000 and one gold mohar of the value of Rs.15. Azhar Husain in his lifetime had executed certain deeds by which he purported in effect to denude himself of his immovable properties, which were of considerable value. Shortly after his death Izatunnissa Begam took proceedings in the Subordinate Judge's Court at Patna to enforce her dower claim. She impleaded in her suit as the principal defendants Ahmadi Begam and the other persons interested

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(1) (1878) L. R. 5 I. A. 211.

(2) (1916) L. R. 43 I. A. 294, 301.

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in Azhar Husain's alienations and as pro forma defendants certain other creditors of the deceased. She claimed by her plaint that these alienations were invalid, and that she was entitled to recover her dower debt from the properties. She prayed for a decree for the Rs.40,015, for a declaration that the properties specified in the schedules to the plaint were "the heritage" of Azhar Husain, and that "the plaintiff be empowered to recover her decree from them." A specific issue was raised at the hearing "whether the dower debt . . . can be realized from the properties mentioned in the plaint." The Subordinate Judge on January 31, 1918, decided in Izatunnissa's favour, and by his decree it was ordered "and decreed that this suit be decreed with costs and interest at the rate of 6 per cent. per annum from this date up to the date of realization, that Rs.40,000 (forty thousand) and one gold mohar worth Rs.15 be declared the dower debt of the plaintiff, that the properties entered in schedules Nos. 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money."

There was no appeal from this decree, which is therefore binding between the parties, and the only question now is whether on a proper construction of the decree the dower debt was charged upon the properties.

In July, 1923, while the greater part of this debt was still unsatisfied, Ahmadi Begam, as the heir of Azhar Husain, sold two of the scheduled properties to the first and second respondents, who alone are contesting this appeal. It is admitted that they had full knowledge of the decree in the dower suit, and in fact they claim that the decree was mortgaged to them by Izatunnissa. If therefore the decree created a charge upon the properties, it is clear that (apart from any question of the mortgage) they bought the properties subject to the charge.

Izatunnissa died in September, 1923, leaving as her heirs the first, second and third appellants, who assigned a share in the decree to the other appellants. On January 26, 1924, the appellants applied for execution of the decree by sale

of the properties, including those sold to respondents 1 and 2, which were attached at the instance of the appellants. The contesting respondents applied to set aside the attachment. The Subordinate Judge held that the decree created a charge upon the properties, and that therefore the respondents' claim was not maintainable. If this view is correct it was probably unnecessary to attach the properties in realization of the decree. Proceedings were taken in review of this order and the case was remitted by the High Court for further investigation. The Subordinate Judge then allowed an amendment of the application for execution, bringing the first and second respondents on the record as representatives of the judgment debtors and making it clear that execution was sought by way of enforcement of the charge. Allegations were made by the respondents that Izatunnissa had been a party to certain mortgages executed by Ahmadi Begam in their favour and had also mortgaged her decree to them. These allegations were denied by the appellants. The documents are not on the record of this appeal, nor is there any material from which it would be possible for their Lordships to come to any safe conclusion on this part of the case.

In the event the Subordinate Judge affirmed his previous decision, that the decree created a charge upon the properties, and finally rejected the respondents' claim.

On appeal to the High Court the learned judges say that the principal point argued before them on behalf of the present respondents was that the decree in the dower suit did not create a charge upon the properties, and upon consideration of the pleadings in the suit and the wording of the decree, they came to the conclusion that no charge was created. They thought that the only object of the suit was to free the properties from the alleged alienations of Azhar Husain and to make them available to satisfy the widow's claim for dower on the same footing as the other debts of the estate. It has not been disputed before their Lordships that a widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor, and that, apart

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from the decree, a bona fide purchaser for value from the heir would get an unassailable title. Their Lordships, however, are unable to agree with the interpretation put by the judges of the High Court upon the decree. It is in their Lordships' opinion clear that the plaintiff in the suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the Court by its decree to imprint upon the properties a specific liability to satisfy the dower debt, or in other words to charge the properties with the payment of this particular debt. They are therefore in agreement with the Subordinate Judge, that the decree created a charge upon the properties, and that the respondents 1 and 2 having bought with notice of the decree, their purchase was subject to the charge. Whether the charge was rightly decreed or not in the first instance is immaterial, though their Lordships see no reason to doubt that it was within the competence of the Court to make such a declaration. But the decree was not appealed against, and is clearly binding on the parties and those claiming under them.

A question was raised in the High Court as to the propriety of the amendment which brought respondents 1 and 2 upon the record, but the judges thought it unnecessary to determine this question, and no reliance has been placed upon this contention before their Lordships.

It only remains to consider what the effective result of the appeal should be. Their Lordships are not, for the reason already stated, in a position to deal with the claim of respondents 1 and 2 to be themselves mortgagees of the dower decree. All they can do is to declare that the decree created a charge upon the scheduled properties, including those purchased by respondents 1 and 2, for the balance due under it for the dower debt. This charge will in any case have to be worked out by the executing Court, and when this question is taken up it will be open to the respondents 1 and 2, if so advised, to set up their claim as mortgagees from Izatunnissa Begam.

Inasmuch as the only competent question throughout the proceedings has been that of construction of the decree, upon

which the appellants have succeeded, their Lordships think that the costs both here and below should be borne by the contesting respondents, and they will humbly advise His Majesty that the decree of the High Court should be set aside and the appeal allowed upon the terms of this judgment.

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VALLABHDAS NARANJI APPELLANT; J. C.*

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DEVELOPMENT OFFICER, BANDRA . . . RESPONDENT.

April 16.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Land Acquisition—Compensation—Buildings erected by Government before Notification.

The Government having resolved to acquire under the Land Acquisition Act, 1894, land belonging to the appellant, took possession by arrangement with sutidars who occupied part of the land, and erected buildings partly on land occupied by the appellant and partly on land occupied by the sutidars. Only after doing so the Government notified a declaration under s. 6 of the Act that the land was required for a public purpose. The appellant was awarded under the Act the value of the land, and interest thereon from the date when possession had been taken:—

Held, that the appellant was not entitled to the value of the buildings, since by the law of India they did not form part of the soil, and even if the appellant would have been entitled to compensation for them if the Government had acted as mere trespassers and without colour of title, the Government had not so acted.

It was not necessary to decide whether the appellant could have recovered compensation in respect of a right to have the buildings removed, as he had not so claimed in India.

Thakoor Chunder Poramanick v. Ramdhone Bhattacharjee (1866) 6 S.W.R. 228 applied.

Decree of the High Court affirmed.

APPEAL (No. 119 of 1927) from a decree of the High Court (February 24, 1926) varying an award by the Assistant Judge at Thana on a reference made under the Land Acquisition Act, 1894, s. 18.

*Present: LORD HAILSHAM L.C., LORD CARSON, and SIR CHARLES SARGANT.

J. C. The land in question in the appeal was held by the
 1929 appellant, the Khot of Kanjur, under a kowl or lease from
 VALLABHDAS the Government. The main question upon the appeal was
 NARANJI whether in proceedings under the Land Acquisition Act,
 v. DEVELOP- 1894, the appellant was entitled to compensation in respect
 MENT OFFICER, of buildings erected by the Government upon the land before
 BANDRA. notifying a declaration under s. 6 of the Act.

The circumstances appear from the judgment of the Judicial Committee.

The Assistant Judge increased the award as to the land but held that the value of the buildings should not be included; he awarded however interest upon the value of the land as compensation for the Government's occupation before the notification.

Both parties having appealed to the High Court, the learned judges (Macleod C.J. and Coyajee J.), by a judgment delivered by the Chief Justice, restored the original award as to the value of the land, and in other respects affirmed the decision.

1929. Jan. 5, 7, 8. *Upjohn K.C.* and *E. B. Raikes* for the appellant.

Sir George Lowndes K. C. and *Kenworthy Brown* for the respondent.

[Reference was made to *Khoderam Sherma v. Trilochun* (1); *Gobind Row Poramanick v. Gooroo Churn Dutt* (2); *Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee* (3); *Narayan v. Bholagir* (4); *Shaik Husain v. Govardhandas* (5); *Premji v. Haji Cassum* (6); *Secretary of State for India v. Charlesworth* (7); *Angammal v. Aslami* (8); *Narayan Das Khettry v. Jatindra Nath Roy Chowdhury* (9); Land Acquisition Act (I. of 1894), ss. 3 (a), 6, 17, 23.]

April 16. The judgment of their Lordships was delivered by LORD CARSON. This is an appeal against a decree made on February 24, 1926, by the High Court of Judicature at

(1) (1801) 1 Sel. R. 46.	(5) (1895) I.L.R. 20 B. 1.
(2) (1865) 3 S.W.R. 71.	(6) (1895) I.L.R. 20 B. 298.
(3) (1866) 6 S.W.R. 228.	(7) (1900) L.R. 28 I.A. 121.
(4) (1869) 6 Bom. H. C. (A.C.J.)	(8) (1913) I.L.R. 38 M. 710.
	(9) 1927 L.R. 54 I.A. 218.

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Bombay, varying an award dated July 28, 1924, by the Assistant Judge at Thana on a reference made under s. 18 of the Land Acquisition Act, 1894.

The land in question is part of the village of Kanjur, and the area in dispute in this appeal is stated to be about 26 3/4 acres. Some of the lands were in the possession of sutidars who had rights of permanent occupancy in their rice fields. The first question which was argued before this Board on the present appeal was the claim of the appellants that certain buildings which had been erected by the Government on the land at the date of the Government's declaration of November 4, 1920, under s. 6 of the Land Acquisition Act had become and were the appellant's property, and that he should be allowed the value of the land in the state in which it then was; that is to say, with the buildings on it. The way that question has arisen is as follows:—

It appears that in 1919 the Government resolved to acquire the land in question and other land under the said Act, and by arrangement with certain of the sutidars they took possession of the land, including a portion which was in the occupation and the property of the appellant. Upon the land, including a portion in the possession of the appellant, they proceeded to erect certain buildings without the necessary notification, which was not served until November 4, 1920. On that date the Government notified, under the Land Acquisition Act, s. 6, a declaration that 52 acres more particularly described therein, situated in the said village and including the land in question in this appeal, were needed for a public purpose, and the collector took order for the acquisition thereof. It is to be observed that the Government were in a position by law at any moment to regularize their position by such a notification—a fact which becomes material when it has to be considered what the nature of their trespass was under the law as applicable on the question of the right of the appellants to have the buildings which were erected on the lands before November 4 included in the valuation.

The Assistant Judge held that the appellant was not entitled to have the said buildings erected by the Government

J. C. included in the valuation, but that he was entitled to compensation for the occupation of the land by the officials before the notification of November 4, 1920, and he awarded such compensation in the form of interest on the value of the land computed from the date when the Government took possession.

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On appeal to the High Court of Appeal at Bombay that Court confirmed on this point the judgment of the Assistant Judge and refused to allow the value of the building to be considered in assessing the amount of compensation to be paid to the appellant. In the course of his judgment the learned Chief Justice said: "It is curious to have to remark that Government entered upon this area before the land was actually notified for acquisition. They seem to have done so in the belief that they could get the consent of the occupants to such possession. They not only took possession, but erected buildings on the land." The learned Chief Justice, however, held that the question was decided by the principles laid down in *Premji Jivan Bhat v. Cassum Juma Ahmed* (1), and he quoted from the judgment of Sargent C.J. in that case as follows: "It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building."

Now up to a certain point there was no difference between counsel for the parties as to the law applicable to the case. It was agreed on both sides that the English law as comprised in the maxim "Quidquid plantatur solo solo cedit" has no application. In 1866, in consequence of a difference of opinion between certain divisions of the Courts, the law was carefully reviewed in a case referred to a Full Bench: *Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee*. (2)

In the order of reference it is stated that the question involved was "whether a person who, being in possession of land as proprietor, erects pukka buildings (of brick, etc.) thereon, has a right, on being subsequently ejected from the land as having no title, to pull down those buildings and remove the materials. In the present case, we decided that he has no such right. Since we so decided, it appears that another Division Bench have, in the case of *Gobind Poramanick v. Gooroo Churn Dutt* (1), decided to the contrary effect."

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The judgment was given by Barnes Peacock C.J., who stated as follows: "We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself." Later on he adds: "We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,—the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The question is, what is meant by a "mere trespasser" as contradistinguished from possession under "any bona fide title or claim of title." In the case quoted the defendant had erected buildings on land sold to his predecessors in title by a widow during the lifetime of the widow, but which sale was held void as being improperly made by the widow, and it is to be noted that the case reported in 3 Sutherland's

J. C. Weekly Reporter, and referred to in the reference, was in
 1929 no way overruled. It is therefore worth while to consider
 — the view taken by the learned judges in that case, who stated
 VALLABHDAS the law as follows: "But, in the present case, we have a
 NARANJI trespasser who has tortiously entered upon the land of another
 v. and built a house thereon. Without going so far as to say
 DEVELOP- under no circumstances could acquiescence by the party
 MENT injured in the act of the injury done, be inferred, we are
 OFFICER, clearly of opinion that no such acquiescence was either
 BANDRA. pleaded or proved in the present case. We, therefore, think
 — the plaintiff is clearly entitled as against the defendant, a
 trespasser, to possession of his land, leaving the defendant at
 liberty to remove the bricks of his house."

Again in *Narayan v. Bholagir* (1), where H., knowing that B. claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow thereon, which B. did not interfere to prevent. Couch C.J., in giving judgment, said: "H. took the risk, and as he was informed of B.'s claim it was not necessary for the latter to give a notice. We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials."

In the recent case before this Board, *Narayan Das Khettry v. Jatindra Nath Roy Chowdhury* (2), the statement first quoted from the judgment of Sir Barnes Peacock was cited with approval, and it was added that such statement "seems to have been accepted for many years as a correct pronouncement."

It was contended, however, on behalf of the appellant that in the various cases relied upon there was at least some genuine claim or belief in the party erecting the buildings that he had a title to do so, even though he was eventually held to be a trespasser; and it was urged that no such claim or belief existed in the present case, in which it was said

(1) 6 Bom.H.C. (A.C.J.) 80. (2) L.R. 54 I. A. 218.

the Government, without any pretence of right, tortiously invaded the appellant's property and proceeded to deal with it as their own. The learned counsel for the respondent, whilst contending that such was not the true state of facts, and that the Government officials could not be considered mere trespassers, was prepared to argue that, even if it were so, once it was admitted that the English maxim did not apply, the logical consequence followed that in any case of trespass by building on the lands of another, the trespasser had a right to remove the structure or be paid the value thereof by the owner, and he relied upon the fact that no case drawing a distinction in the nature or degree of the trespass could be found. Their Lordships, however, do not think it necessary to give a decision upon this far-reaching contention. They agree with what was apparently the view of both Courts in India that under the circumstances of this case, as already set forth, by the law of India, which they appear to have correctly interpreted, the Government officials were in possession "not as mere trespassers" but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner. They considered, and their Lordships agree, that the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the lands by the officials before the notification of November 4, 1920, which, as before stated, was awarded in the form of interest in the value of the land computed from November 27, 1919, the date when the Government took possession. This method of compensation has not been questioned by the respondents.

The case of *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.* (1) was referred to in the course of the argument to support a claim that at all events the appellants had at the crucial date a right to call upon the respondents to remove the buildings, and that they were entitled to be paid for their land with such a right attaching to it. Whether that case applies or whether such a right

(1) L.R. 28 I.A. 121.

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J. C. would be of any value, their Lordships do not think it necessary to decide, as it is admitted that no such claim was put forward before either of the Courts in India. Their Lordships must hold, therefore, that the Courts below were right in disallowing the claim of the appellants in respect of buildings, and on this point the appeal fails.

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— The appellant has also appealed against so much of the judgment of the High Court as reduced the value placed upon the land by the District Judge. The main contentions were (1.) that as the land had admittedly potentialities as building land the High Court had not the evidence before it to reduce the estimate made by the District Judge, and in fact ignored the evidence upon this point, and (2.) that the District Judge, when he dealt with the transaction relating to a plot of the land (Survey No. 170) containing 16,000 square yards, and sold in the month of April, 1920, at 8 annas per square yard, was right in accepting this transaction as a reasonable guide to the value of all the land in question, on the ground that this plot was not so favourably situate as the bulk of the land. The High Court has very fully dealt with these considerations and given their reasons for not being able to accept the conclusions at which the District Judge had arrived.

Their Lordships are unable to find any principle involved which could lead them to say that the High Court were wrong in arriving at the decision to which they have come, and as the questions involved are ones of valuation and not of principle, their Lordships, in accordance with the usual practice of this Board, must decline to speculate as to the proper amount to be awarded under such circumstances.

The appeal upon this point accordingly fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Ranken Ford & Chester.*

Solicitor for respondent: *Solicitor, India Office.*

JAGGO BAI (PLAINTIFF)	APPELLANT;	J. C.*
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UTSAVA LAL (DEFENDANT)	RESPONDENT.	April 19.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Limitation-Suit for Possession-Suit by reversionary Heir-Adverse Possession for twelve Years at Widow's Death—Suit for Declaration during Widow's Life-Code of Civil Procedure (Act V. of 1908), Order II., r. 2—Indian Limitation Act (IX. of 1908), Sch. I., arts. 120, 141.

A decree against a Hindu widow in relation to her deceased husband's property is binding upon the reversioners although it is founded upon limitation; but under the Indian Limitation Act, 1908, Sch. I., art. 141, a suit by the reversionary heir for possession of immoveable property of the estate, as to which no decree has been made against the widow, is not barred by limitation if it is brought within twelve years of his estate falling into possession, even though the defendant has been in adverse possession for twelve years at the date of the death of the widow.

Hurrinath Chatterji v. Mothoor Mohun (1893) L.R. 20 I.A. 183 and *Runchordas v. Parvatibhai* (1899) L.R. 26 I.A. 71 followed.

The article of the above Act applicable to a suit for a declaration that a will is invalid so far as it purports to dispose of a malikana granted by Government is art. 120, and the right to sue does not accrue until the plaintiff has obtained a certificate under the Pensions Act, 1871; the suit therefore is not barred if brought within six years of obtaining the certificate.

A reversioner on the death of a Hindu widow who has sued during the widow's life for a declaration as to his rights is not barred by Order II., r. 2, from including in a suit brought after her death a claim which the Court was not competent to deal with in the previous suit owing to the absence of a certificate under the Pensions Act, 1871, or a claim to possession which he was not then entitled to.

Decree of the High Court reversed.

APPEAL (No. 115 of 1927) from a decree of the High Court (November 26, 1925) reversing a decree of the Additional Subordinate Judge of Banda.

The suit was brought by the appellant on December 15, 1920, for a declaration that she was entitled to a malikana granted by the Government, and to eject the respondent from a house at Warnagar. The properties in suit formed part of the estate of the appellant's father, who died in 1875,

*Present: LORD BLAINESBURGH, LORD TOMLIN, and SIR LANCELOT SANDERSON.

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and had been in possession of her mother for a widow's estate until February, 1914, when she died and the appellant became entitled as her father's heir. The defendant-respondent pleaded that the suit was barred by limitation, and that she had acquired title by adverse possession; she also pleaded that the suit was barred under the Code of Civil Procedure, s. 11, exp. iv., and Order II., r. 2, having regard to a suit brought by the appellant in 1890.

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge decreed the suit, but his decree was reversed by the High Court. The learned judges (Mears C.J. and Lindsay J.) held that the suit was barred by adverse possession; in their view the defence of *res judicata* failed.

1929. March. 1, 4, 5, 7. *De Gruyther K.C.* and *Abdul Majid* for the appellant. The suit came directly within the description in the Indian Limitation Act, 1908, Sch. I., art. 141, so that the period was twelve years from the death of the widow. Art. 144 by its terms does not apply when any other article does so. The malikana was immovable property being an annual sum arising out of land; that view was not contested in India. It is well established by decisions in India that under the corresponding articles of Acts of 1871 and 1877, a reversioner has twelve years from the death of the widow in which he may sue for possession, and that his claim is not affected by adverse possession during the widow's life: *Srinath Kur v. Prosunno Kumar Ghose* (1); *Ram Kali v. Kedar Nath* (2); *Venkataramayya v. Venkatalakshamma* (3); *Cursandas Govindji v. Vundravandas Purshotam*. (4) Those decisions have been frequently followed in the respective High Courts, and in effect were approved by the Board in *Runchordas v. Parvatibhai*. (5) In *Vaithialinga Mudaliar v. Srirangath Anni* (6) a decree against the widow had been obtained; the Board decided nothing adverse to

(1) (1883) I.L.R. 9 C. 934.

(4) (1889) I.L.R. 14 B. 482.

(2) (1892) I.L.R. 14 A. 156.

(5) (1899) L.R. 26 I.A. 71.

(3) (1897) I. L. R. 20 M.

(6) (1925) I. L. R. 48 M. 883;

the present contention. The decision of a Full Bench of the Allahabad High Court in *Bankey Lal v. Raghunath Sahai* (1) is contrary to the decision now appealed from. Cases decided under the Limitation Act of 1859 do not apply, a new principle having been introduced by the Act of 1871 and maintained in subsequent Acts.

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Upjohn K.C. and *Parikh* for the respondent. The malikana was not a rentcharge but merely a personal right, and therefore not immovable property; so far as the suit related to the malikana art. 120 applied, and the suit was thereby barred. But in any case the suit was barred. The defendant had been in adverse possession for twelve years when the widow died, and under s. 28 had acquired a title. The plaintiff was therefore not "entitled to the possession" of the property on the death of the widow so as to make art. 141 applicable. Art. 141 cannot have the effect of divesting a title. The Act of 1871 did not destroy the principle laid down in the *Shivagunga* case (2) that the whole estate is vested in the widow, and its application to limitation in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*. (3) The decision last cited was approved by the Board in *Aumirtolall Bose v. Rajoneekant Nitter* (4) and recently in *Vaithialinga Mudaliar v. Srirangath Anni* (5) and *Mata Prasad v. Nageshar Sahai*. (6) The decision in *Runchordas*' case (7) does not apply, as the property there in suit was in the hands of trustees and there could be no adverse possession; also the judgment must be read subject to the explanation in *Vaithialinga Mudaliar v. Srirangath Anni*. (5) [Reference was made also to *Hurrinath Chatterji v. Mothoor Mohun* (8) and *Chaudhri Risal Singh v. Balwant Singh*. (9)] Further the suit was barred by Order II., r. 2, as the appellant in her suit of 1890 could have claimed that the alienations of the malikana and the house were invalid: *Janaki Ammal v. Narayanasami Aiyar*. (10)

(1) (1928) 26 All.L.J. 1049.

(2) (1863) 9 Moo.I.A. 543.

(3) (1868) 9 S.W.R. 505.

(4) (1875) L.R. 2 I.A. 113, 121.

(5) L.R. 52 I.A. 322.

(6) (1925) L.R. 52 I.A. 398.

(7) L.R. 26 I.A. 71, 81.

(8) (1893) L.R. 20 I.A. 183.

(9) (1918) L.R. 45 I.A. 168.

(10) (1916) L.R. 43 I.A. 207.

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De Gruyther K.C. in reply. In *Runchordas*' case (1) the Board decided the question of limitation arising in this appeal, rejecting the very argument now relied upon. Cases under the Act of 1859, and cases in which there was a decree against the widow, do not apply. If art. 120 applies as to the malikana the absence of a certificate under the Pensions Act, 1871, prevented the appellant from enforcing her rights until within six years of the present suit. The suit is not barred by Order II., r. 2, because the plaintiff had in 1890 no right to possession, and as to the malikana she had no certificate.

April 19. The judgment of their Lordships was delivered by LORD TOMLIN. This is an appeal from a decree dated November 26, 1925, of the High Court of Judicature at Allahabad reversing in part a decree dated May 19, 1922, of the Subordinate Judge of Banda.

The plaintiff is under Hindu law the heiress of her father, Uttam Ram, who died on October 30, 1875, without having had a son. Her right to possession of her father's estate did not accrue until February, 1914, on the death of her father's widow, Deo Koer (hereinafter called the mother). The mother was entitled to the estate while living. At the death of Uttam Ram there were also living his mother, Jarao Bai (hereinafter called the grandmother), and his deceased brother's widow, Man Koer (hereinafter called the aunt).

The estate of Uttam Ram included (inter alia) several villages, an 8-anna share in the village of Pachnehi, and a house at Warnagar in Baroda. The other 8-anna share in the village of Pachnehi was owned by Durga Prasad, who was a debtor to the estate of Uttam Ram.

After Uttam Ram's death the aunt, with the assistance apparently of the grandmother, got possession, to the exclusion of the mother, of some of the villages or of a half share therein, and also of the house at Warnagar. The grandmother died in 1877.

By a document dated September 10, 1880, Durga Prasad, the mother and the aunt affected to release the village of

Pachnehi to the Government in return for a perpetual malikana of Rs.2000, one-half of which represented the share of Uttam Ram's estate in the village and the other half of which represented the share of Durga Prasad therein. By a sale deed dated October 6, 1880, Durga Prasad made over Rs.500, representing one-half of his share in the malikana to the mother and the aunt in satisfaction of his indebtedness to Uttam Ram's estate. Thereafter, therefore, Rs.1500 out of the malikana of Rs.2000 formed part of Uttam Ram's estate. In fact, the mother and the aunt received payment of the malikana of Rs.1500 in equal moieties.

In 1886 the mother began a suit (No. 237 of 1886) in the Court of the Subordinate Judge at Banda against the aunt, seeking to establish her title as an heir of Uttam Ram to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom, and to establish her title to the whole of the malikana of Rs.1500. No reference was made in the plaint to the house at Warnagar.

The Subordinate Judge gave judgment in favour of the mother in respect of the villages, but held that in the absence of a certificate under the Pensions Act, 1871, the Court was not competent to deal with the malikana. The decision of the Subordinate Judge as to the villages was reversed on appeal to the High Court of Judicature at Allahabad. Thereupon the mother appealed to His Majesty in Council.

Pending the appeal of the mother to His Majesty in Council the plaintiff began a suit (No. 481 of 1890) in the Court of the Subordinate Judge of Banda against the mother and the aunt, seeking to establish her title as reversionary heir of Uttam Ram, subject to the mother's interest as widow to the immovable property of Uttam Ram mentioned in the plaint, including the villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document dated October 9, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of Pachnehi, but contained no reference to the house at Warnagar.

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On June 30, 1891, the Subordinate Judge declared that the plaintiff was entitled to succeed to the property in dispute on the mother's death, and that on the mother's death the arbitration award of October 9, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff. On January 16, 1894, an appeal by the aunt to the High Court of Judicature at Allahabad was dismissed with costs.

In the meantime the mother's appeal to His Majesty in Council in the suit No. 237 of 1886, came before their Lordships' Board, and in July, 1894, the appeal was allowed, and the judgment of the Subordinate Judge was restored in respect of the villages in dispute, but the view of the Courts below that under the Pensions Act, 1871, there was no jurisdiction in the absence of a certificate to deal with the malikana was affirmed: see *Deo Kuar v. Man Kuar*. (1)

As the result of this litigation the mother apparently recovered possession of all the villages, but the aunt continued to receive one-half of the malikana of Rs.1500, and remained in possession of the house.

The mother died in February, 1914, and, thereupon, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on June 20, 1920, having by her will, dated July 3, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the malikana which she was receiving and of the house at Warnagar. The plaintiff then claimed to be entitled to the whole of the malikana of Rs.1500 and to the house. In consequence of the dispute the Government withheld payment of the malikana.

On December 15, 1920, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, launched against the defendant the present suit in the Court of the Subordinate Judge of Banda.

By her plaint the plaintiff alleged (para. 9) that she was in possession of the entire property which was in the possession of the mother, but that on the death of the aunt it was found

that the aunt had executed a will dated July 3, 1919, in favour of the defendant in respect of the malikana amount, certain muafi property, and the house at Warnagar, whereas the aunt had not title or power to make a will, that the aunt was in possession merely in lieu of maintenance allowance as a widow of the family and that for this very consideration she had not been deprived and dispossessed of the malikana amount and other property, and that the will was totally invalid and ineffectual against the plaintiff, and (para. 13) that the mother as a widow had only a life interest in the family property, and that the aunt had no right in the property except that of maintenance, that the mother had no power to transfer to the Government by means of the document of September 10, 1880, the village of Pachnehi, which was of considerable value, and that, therefore, the plaintiff wanted to bring a suit for recovery of possession of the said property, but that as the time for the suit given in the certificate would expire on December 19, 1920, and as, according to law, it was necessary to give a formal notice to Government before the institution of a suit for recovery of possession of the property the plaintiff had in the plaint included only a claim for declaration of right as regards the malikana amount by invalidation of the will subject to her rights regarding recovery of possession of the property.

The plaintiff then asked (inter alia) for the following relief :
 (a) That it might be declared that the alleged will of the aunt was invalid and unenforceable as against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs.750, the malikana amount or any right in other property in respect of which the will had been made, and (b) that the plaintiff might be put in possession of the muafi property and the house at Warnagar by dispossession of the defendant.

On May 19, 1922, the Subordinate Judge ordered that the plaintiff's claim for a declaration as prayed in respect of the malikana and the house at Warnagar, and her claim for recovery of possession of the house be decreed. In his judgment the learned judge held that the suit was not barred

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by Order II., r. 2, of the Code of Civil Procedure, and that the aunt had not been in adverse possession of the malikana and the house for over twelve years as against the plaintiff. He also held that the plaintiff's claim was not barred by the Limitation Act, and that the aunt had no right to dispose by her will of the malikana or the house. The judge dismissed the suit as to the muafi lands, and there was no appeal by the plaintiff as to this part of his decision.

The defendant appealed to the High Court of Judicature at Allahabad against the decree so far as it was adverse to him. On November 26, 1925, the High Court allowed the appeals, set aside the decree of the Subordinate Judge so far as it related to the malikana and the house, and dismissed the suit. In the judgment of the High Court it was held that the aunt had been in adverse possession, that time began to run against the plaintiff in the lifetime of the mother when the aunt first took possession and that the plaintiff was, therefore, statute barred. It was further held that as in the previous suit (No. 481 of 1890) by the plaintiff against the mother and the aunt there had been no jurisdiction in the absence of a certificate to deal with the malikana, and as the house had not been included in the suit there was no res judicata binding the plaintiff.

The plaintiff obtained leave to appeal to His Majesty in Council, and appealed accordingly.

Before their Lordships' Board it was but faintly contended by the plaintiff that the possession of the aunt had not been adverse, and their Lordships are of opinion that it was adverse.

On the part of the plaintiff it was urged that art. 141 of the Limitation Act applied, and that as under that article in a suit for possession by a Hindu entitled to possession of immovable property on the death of a Hindu female the time allowed is twelve years from the death of the female, the plaintiff was entitled to succeed on the appeal, because at the institution of the suit twelve years had not run from February, 1914, the date of the death of the mother.

On the part of the defendant it was contended (1.) that by reason of Order II., r. 2, of the Civil Procedure Code the

plaintiff was precluded from bringing the suit, having regard to the fact that she had in the previous suit (No. 481 of 1890) against the mother and aunt already sought to establish her title as heir; (2.) that the malikana was not immovable property; (3.) that in regard to the malikana the suit was not a suit for possession, and that, therefore, art. 141 of the Limitation Act, 1908, did not apply; (4.) that so far as the malikana was concerned art. 120 applied, and that under that article six years only from the date when the right of action accrued is allowed, with the result that as more than six years had run between the date of the mother's death and the institution of the suit the plaintiff's claim in respect of the malikana was statute barred; and (5.) that upon the true construction and effect of art. 141 of the Limitation Act, 1908, a reversionary heir is not entitled to the benefit of twelve years from the death of the female in a case where at the death of the female adverse possession had already run for twelve years against her in her lifetime, and that as the aunt had been in adverse possession against the mother for more than twelve years before the mother's death this article could not avail the plaintiff, and that the barring of the mother in her lifetime had, upon the principle of the *Shivagunga* case (1), operated to bar the interest of the plaintiff.

These contentions of the defendant accordingly require to be dealt with seriatim:

(1.) By Order II., r. 2, of the Civil Procedure Code it is provided (sub-cl. 1) that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but that a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court, and (sub-cl. 2) that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

By reason of the absence of a certificate under the Pensions Act, 1871, the Court, in the previous suit (No. 481 of 1890), was not competent to deal with the question of the malikana,

(1) 9 Moo. I. A. 539.

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and the plaintiff had no right of action in respect of it. In their Lordships' opinion the plaintiff's claim to the malikana was not, therefore, part of the claim which she was entitled to make in the previous suit. The house was not mentioned in the previous suit. In that suit the plaintiff was seeking to establish her title to her father's estate as heir in reversion on her mother's death. She was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of that estate. In the present suit she is seeking to recover possession of the house upon the footing that it forms part of the estate and that the defendant is in wrongful possession of it. The present cause of action arises out of tortious conduct on the part of the defendant or his predecessor the aunt in respect of the house, and is in their Lordships' opinion, a cause of action distinct from that in the previous suit. The claim which the plaintiff is now making could not in fact have been made in the previous suit.

The first contention of the defendant therefore fails.

(2.) Their Lordships are satisfied that the point as to the malikana not being immovable property was not taken in either of the Courts below, and that each of the Courts below treated the malikana as immovable. In these circumstances, the defendant not being willing that there should be any remand of the case for further evidence, their Lordships are of opinion that the point is not open.

(3.) Having regard to the language of paras. 9 and 13 of the plaint in the suit and to the form of the relief sought therein, their Lordships do not consider that the suit so far as the malikana is concerned is a suit for possession or within the operation of art. 141 of the Limitation Act.

(4.) In their Lordships' view art. 120 is the relevant article so far as the malikana is concerned. Under the Pensions Act, 1871, however, there is, in their Lordships' opinion, no right of action at all in respect of such a subject-matter as the malikana unless and until a certificate under the Act has been obtained. Their Lordships therefore hold that as less than six years had run between the grant of the certificate

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and the institution of the present suit the plaintiff's claim in respect of the malikana is not statute barred under art. 120.

(5.) Art. 141 of the Limitation Act, 1908, admittedly applies to the claim to recover possession of the house. The point raised by the defendant upon the construction and effect of this article is of importance, and is one upon which there has been some difference of opinion in India.

Under Act XIV. of 1859, suits for the recovery of immovable property had to be brought within twelve years from the time when the cause of action arose. The Limitation Act of 1871, which repealed the Act of 1859, employed different language. Art. 142 in the Second Schedule of that Act prescribed for a suit for possession of immovable property by a Hindu entitled to the possession of immovable property on the death of a Hindu widow a period of limitation of twelve years beginning to run from the time when the widow died. This provision, enlarged so as to cover a suit by a Mahomedan, was reproduced in the Act of 1877, and again in art. 141 of the Act of 1908.

The judgment of their Lordships' Board in the *Shivagunga* case (1) established the principle of the representation of the inheritance by a Hindu widow. That case was decided during the currency of the Act of 1859.

In *Hurrinath Chatterji v. Mothoor Mohun* (2) their Lordships' Board held that the effect of the Acts of 1871 and 1877 was not to except from the rule laid down in the *Shivagunga* decision the case where a decree had been obtained against a Hindu widow in her lifetime founded upon the law of limitation. Sir Richard Couch, in delivering the judgment of the Board, said: "Their Lordships see no ground for this contention" (i.e. that the case was excepted). "The words 'entitled to the possession of immovable property' refer to the then existing law."

It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of art. 141.

(1) 9 Moo. I. A. 539.

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The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for twelve years or more.

In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the article to ignore the express words of the article.

But their Lordships are further of opinion that the point is already concluded by the judgment of their Board in *Runchordas v. Parvatibhai*. (1) In that case a testator who died in 1869, leaving two widows, devised the whole residue of his estate to trustees for dharam. One widow died in 1871, and the other died in 1888. After the death of the second widow the heir of the testator sued for a declaration that the devise to dharam was void and for administration. The High Court held that the gift in dharam was invalid and there was an intestacy. The High Court further held that the possession of the trustees for dharam since the testator's death had been adverse as against the widows and the heir but that the plaintiff's claim to the immovable property was not barred. It was also held that the plaintiff's claim to the movable property was barred by limitation. On appeal to His Majesty in Council their Lordships' Board held that art. 141 of the Act of 1877 (now reproduced in art. 141 of the Act, 1908) applied to the immovable property, and that under it time ran from the death of the second widow, and that, therefore, the plaintiff in the suit was not barred by limitation. It was also held that art. 120 of the Act, 1877 (now reproduced in art. 120 of the Act, 1908), applied to the movable property, and that the right of the plaintiff

in the suit to sue under that article only accrued on the death of the second widow, and was, therefore, also not barred.

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The case of *Vaithialinga Mudaliar v. Srirangath Anni* (1) illustrates the application of the rule in the *Shivagunga* case (2), where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgment, in conflict with that in *Runchordas v. Parvatibhai* (3), in which no decree had been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest.

In their Lordships' judgment, therefore, the appeal succeeds, with the result that the decree of the High Court ought to be discharged and the decree of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The defendant must pay to the plaintiff the costs of the appeal to the High Court and the costs of the appeal to His Majesty in Council.

Solicitors for appellant: *Summerhays, Son & Barber.*

Solicitors for respondent: *T. L. Wilson & Co.*

(1) L. R. 52 I. A. 322.

(2) 9 Moo. I. A. 539.

(3) L. R. 26 I. A. 71.

J.C.* RAMJI (PLAINTIFF) APPELLANT;

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May 9. RAO KISHORESINGH (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER, CENTRAL PROVINCES.

Specific Performance—Pecuniary Compensation an adequate Remedy—Assessment of Compensation—Conclusiveness of Findings in second Appeal—Code of Civil Procedure Act (V. of 1908), ss. 100, 101—Specific Relief Act (I. of 1877), ss. 12 (c), 21 (a).

In consideration of Rs.5000 advanced by the appellant to enable the respondent to prosecute an appeal to the Privy Council, the respondent agreed in writing that if the appeal were successful he would sell a village to the appellant for the sum advanced. The appeal having succeeded, the appellant sued for specific performance. The District Judge found (reversing the trial Court) that the bargain was not extortionate or harsh, and directed the execution of a sale deed. He found also, however, that Rs.20,000 compensation would have been an adequate remedy. Upon a second appeal the bargain was found to be unconscionable, and a decree was made for Rs.11,555. It was not contended in India that it was probable that pecuniary compensation could not be got:—

Held. that there being evidence in support of the above findings of the District Judge the Code of Civil Procedure, 1908, ss. 100, 101, made them binding in second appeal, and that, as he had found that pecuniary compensation would be an adequate remedy, the Specific Relief Act, 1877, ss. 12, 21, precluded a decree for specific performance; but that the decree should have been for Rs.20,000, the amount at which he had assessed the compensation, with interest.

APPEAL (No. 82 of 1927) from a decree of the Court of the Judicial Commissioner, Central Provinces (August 22, 1925), setting aside a decree of the District Judge, Nimar, which reversed a decree of the Subordinate Judge of Khandwa.

The suit was brought by the appellant against the respondent for specific performance of an agreement; he claimed an order that the respondent should execute a sale deed of a certain village, and alternatively repayment with interest of Rs.5000 advanced by him together with compensation.

The facts of the case and the decisions of the Courts in the Central Provinces appear from the judgment of the Judicial Committee.

* Present: LORD SHAW, LORD CARSON, and SIR LANCELOT SANDERSON.

April 16. *Dunne K.C.* and *Parikh* for the appellant. By the Code of Civil Procedure, ss. 100, 101, the finding of the District Judge that the agreement was not extortionate or even harsh was binding in the second appeal: *Durga Choudhrain v. Jawahir Singh Choudhri*. (1) In any case, having regard to *Raghunath Prasad v. Sarju Prasad* (2), there was no ground for holding that the bargain was unconscionable. The decree for specific performance should have been affirmed. Under the explanation to s. 12 of the Specific Relief Act, 1877, it is to be presumed that compensation would not be an adequate remedy. There was no ground for the District Judge's view that it would be. In any case, s. 12 (d) gave him a discretion to decree specific performance if he was of opinion that pecuniary compensation could not be got. It is to be assumed that he so found. If a substantive decree for specific performance is precluded by s. 21 (a), the decree should provide that upon failure to pay the decreed sum within a limited period, the property should be transferred.

Kyffin for the respondent. It is conceded that the finding of the District Judge as to the value of the property was binding in the second appeal, but his finding that the bargain was not extortionate was wrong in law. In any case, as he found that pecuniary compensation would be an adequate remedy, ss. 12 and 21 of the Specific Relief Act preclude a decree for specific performance, even as an alternative relief. It was not contended in India, nor is it by the appellant's case in appeal, that pecuniary compensation could not be got.

Parikh in reply. Under s. 151 of the Code a decree in the alternative form suggested can be made if necessary for the ends of justice.

May 9. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner, Central Provinces, setting aside a decree of the District Judge, Nimar. The date of the first mentioned

(1) (1890) L. R. 17 I.A. 122, 127.

(2) (1923) L. R. 51 I.A. 101.

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decrees was August 22, 1925, and the date of the second mentioned—namely, that of the District Judge—was May 8, 1924.

In 1908 the defendant-respondent had instituted a suit against two widows to recover possession of an estate known as the Bhamgarh Zamindari, and after having obtained a decree in his favour, that decree was reversed by the Court of the Judicial Commissioner. He desired to prosecute an appeal to His Majesty in Council, and to enable him to do so he had to raise money. He entered into an agreement with the plaintiff on November 11, 1912, with regard to the advance of the sum of Rs.5000 by the plaintiff on the terms therein mentioned. The agreement was as follows: "I have brought from you Rs.5000 in order to file my appeal to the Privy Council, and at this time I am very badly in need of this amount, because if you do not pay me the amount now, it will be extremely difficult for me to file the appeal. Therefore I lay down in writing and bind myself by this agreement that when I may win my case in the Privy Council in England and a decree may be passed in my favour, I shall at once sell, in lieu of this amount, the full sixteen anna proprietary rights of mauza Khedi out of my villages . . . under a duly registered sale-deed and put you in possession of the mauza. If I fail to do so, you may take possession of the mauza and get a sale-deed duly executed through a Civil Court. If unfortunately the decree be not passed in my favour and the case decided against me, I shall pay interest at eight annas per cent. per mensem on this amount from the date of the decision of appeal, and execute a separate bond for the same agreeing to pay the amount by instalments. I shall not raise any objection. And on winning the case, I shall execute a sale-deed of mauza Khedi, tahsil Harsud, in lieu of this amount, without fail. Therefore I have executed this deed of agreement with my free will and pleasure on receiving the amount in cash. It is true. It may remain as a record and be of use when necessary."

Shortly stated, the facts are that he won his case before the Judicial Committee of the Privy Council, which allowed his

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appeal, and that he refused to carry out the agreement above quoted; hence the present suit.

The remedy sought by the plaintiff was for a decree ordering the execution of a registered sale deed of the mauza named, and possession; and in the alternative a refund of the Rs.5000 with interest and compensation.

The defendant pleaded that the plaintiff was not entitled to a decree for specific performance for the following reasons: “(1.) That the village Khedi yields a profit of nearly Rs.1100 a year, and is now, and was at the time of the agreement worth not less than Rs.20,000. (2.) The distress and distracted state of mind which the defendant was in at the time of the agreement gave the plaintiff an unfair advantage to secure the village for one-fourth of its value. The discretion to decree specific performance should not be exercised in plaintiff's favour under s. 22, Specific Relief Act. (3.) That there has been undue delay in bringing the suit.”

The suit on remand was tried by the learned Subordinate Judge of Khandwa, who declined to make a decree for specific performance. He held that the village of Khedi was worth at least Rs.20,000, that the agreement entered into was highly speculative, that it was unfair and extortionate, and he made a decree in favour of the plaintiff for Rs.10,000, with interest at the rate of 6 per cent. per annum as stated in the decree. The plaintiff appealed to the learned District Judge, who held that the defendant was in serious money difficulties and was distressed in mind at the time the agreement of November 11, 1912, was made, but that he was not overwhelmed by distress, that the value of the village Khedi at the date of the said agreement had not been proved to be more than was admitted by the plaintiff—namely, Rs.9000—that the bargain was not extortionate, that the trial Court was wrong in holding that the defendant had been imposed upon by the plaintiff and his supposed confederates, and that the trial Court was wrong in refusing specific performance.

Accordingly the learned District Judge made a decree for specific performance, and he directed that the defendant should execute a sale deed conveying the village Khedi to the plaintiff.

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It is necessary to refer to two other findings of the learned District Judge—namely: (1.) that damages would have been an adequate relief to the plaintiff, and (2.) that such damages should be Rs.20,000.

In dealing with this question the learned judge said as follows: "No special damages have been proved by the plaintiff. He simply invested money, and a return of money should normally be sufficient. It is not shown that he had any pressing need for land. On the contrary, from the very nature of the contract it is evident that there was no hurry at all, and that not only might plaintiff fail to get the land, but in any case he could not expect to get it for several years. Indeed, the only reason for insisting upon specific performance is that the value of the village now is probably more than the money advanced plus reasonable interest. Plaintiff can certainly say that he took a risk and that he should be compensated for such risk. But compensation could be given in money. This ground of appeal must fail."

In their Lordships' opinion, the learned District Judge came to a clear finding that compensation in money was an adequate relief to the plaintiff, and having regard to the provisions contained in the material sections of the Specific Relief Act (I. of 1877), to which reference will presently be made, it is difficult to understand how the learned judge came to make a decree for specific performance of the contract in view of the above mentioned finding.

On the hearing of the appeal before this Board it was admitted by the learned counsel for the plaintiff that he was bound by the above mentioned finding unless he could show that there was no evidence in support thereof, and he argued that there was no such evidence.

It will be convenient to dispose of this question at once.

Their Lordships are of opinion that there was evidence; the nature of the transaction, the terms of the agreement itself, and the other matters mentioned by the learned District Judge in the passage of his judgment, already cited, are sufficient to show that there was evidence on which the learned District Judge could properly arrive at the above

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mentioned finding. In their Lordships' opinion, therefore, it must be taken for the purposes of this appeal that compensation in money was an adequate relief to the plaintiff for the non-performance of the contract by the defendant, and that the amount of such compensation should be Rs.20,000.

The defendant appealed to the Court of the Judicial Commissioner, and the appeal was heard by the Judicial Commissioner and the Additional Judicial Commissioner.

The learned Judicial Commissioners on the hearing of the appeal entered into the consideration of questions which were not open to them having regard to the findings of the District Judge and the provisions of ss. 100 and 101 of the Civil Procedure Code.

With reference to these sections their Lordships find it necessary once more to refer to the well known passage in the judgment of Lord Macnaghten in *Durga Choudhrain v. Jawahir Singh Choudhri* (1), which dealt with the material sections relating to second appeals in the Code of Civil Procedure, 1882. The passage is as follows: ". . . It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

The provisions of the above mentioned sections of the Code of 1908 and the above mentioned ruling, which is applicable to the present Code, were disregarded in the present case. As, for instance, the first appellate Court held that the value of the property at the time of the agreement in 1912 was not more than was admitted by the plaintiff—namely, Rs.9000. The Judicial Commissioners did not accept this finding of fact, but they held on the evidence that in 1912 the value of the village was not far below Rs.20,000.

(1) (1890) L. R. 17 I. A. 122, 127.

J. C. Again, the first appellate Court held that the bargain was
 1929 not extortionate, that it was not even harsh, but that it was
 ——
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 v. and unconscionable bargain, of which specific performance
 RAO should be refused.
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It was not open to the Court of the Judicial Commissioner to interfere with either of the above mentioned findings of fact of the first appellate Court, inasmuch as there was ample evidence in support of the findings of the first appellate Court which was proper for its consideration. For these reasons alone the judgment of the Court of the Judicial Commissioner cannot be supported.

There is, however, a further difficulty in the way of supporting the judgment of the Court of the Judicial Commissioner. The Judicial Commissioners agreed with the first appellate Court in the finding that compensation in money was an adequate relief to the plaintiff, and they further held that the value of the village was not far below Rs.20,000 in 1912, the date of the agreement. Yet the decree of the Court of the Judicial Commissioner was not for Rs.20,000, as would have been expected, but a sum of Rs.11,555-13-4 only was awarded. Their Lordships understand that this sum was arrived at on the basis that the agreement was a hard and unconscionable bargain, and that the plaintiff was entitled to no more than a return of the money advanced by him, together with interest thereon. It has already been mentioned that it was not open to the Court of the Judicial Commissioner to disturb the finding of the first appellate Court that the agreement was not harsh or extortionate, and that it was a fair bargain.

It remains to consider what is the proper decree on the facts of this case.

In view of the finding of the first appellate Court it must be taken that the agreement of November 11, 1912, was not extortionate, harsh or unconscionable, and that it was a valid and binding agreement. It is clear that the defendant committed a breach of the agreement by his failure to carry out the terms thereof, when his appeal to the Judicial

Committee of the Privy Council, referred to in the agreement, was successful. The only other question is to what relief was the plaintiff entitled in the suit?

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It was found, as already mentioned by the learned District Judge, that compensation in money was an adequate relief to the plaintiff, and this finding was affirmed by the Court of the Judicial Commissioner. Consequently it must be taken for the purpose of this appeal that the above mentioned finding stands. Their Lordships desire to add that they see no reason for thinking that the finding of the Courts in India in this respect was in any way incorrect.

The material provisions of the Specific Relief Act (I. of 1877) are ss. 12 (c) (d) and the explanation thereto, 19, 21 (a) and 22, and are as follows:—

“ 12. Except as otherwise provided in this chapter, the specific performance of any contract may in the discretion of the Court be enforced (c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

“Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.”

“ 19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. . . .

“ 21. The following contracts cannot be specifically enforced: (a) A contract for the non-performance of which compensation in money is an adequate relief. . . .

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“ 22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

“ The following are cases in which the Court may properly exercise a discretion not to decree specific performance: I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.”

Reliance was placed by the learned counsel for the plaintiff on the explanation to s. 12, and it was argued that the learned District Judge was right in making a decree for specific performance. The obvious answer is that in this case the presumption referred to in the explanation was rebutted, because it was proved and found that the breach of the contract could be adequately relieved by compensation in money.

It was further argued that it was probable that pecuniary compensation could not be got for the non-performance of the act agreed to be done, and that consequently the case fell within s. 12 (d). This point, as far as their Lordships can discover, was not taken in the Courts in India, nor was it mentioned in the reasons set out in the plaintiff-appellant's case on appeal to this Board. The learned counsel for the plaintiff was not able to draw their Lordships' attention to any evidence which would justify them in holding that there is a probability that pecuniary compensation, if awarded, cannot be recovered.

In view of the finding that compensation in money is an adequate relief to the plaintiff and in view of the express provisions contained in ss. 12 (c) and 21 (a), their Lordships are of opinion that a decree for specific performance of the contract should not be made.

The decree, therefore, must be for compensation in money, and the only remaining question is one of amount. There

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is no difficulty in this respect. It is clear that at the date of the breach of the contract the value of the village was about Rs.20,000, and the learned District Judge held that the amount of the "damages," which he thought would have been an adequate relief, was Rs.20,000.

The proper order, therefore, is that a decree in favour of the plaintiff should be made for Rs.20,000, with interest thereon at the rate of 6 per cent. per annum until realization.

Consequently, their Lordships are of opinion that the plaintiff's appeal should be allowed, and that the decrees of the Courts in India should be set aside except in so far as the said decrees relate to the payment of costs, that a decree should be made in favour of the plaintiff as above mentioned, that the defendant should pay the costs of this appeal, and that the order of the Court of the Judicial Commissioner as to payment of costs contained in the decree of August 22, 1925, should stand, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *Valpy, Peckham & Chaplin.*

J. C.* GURUDAS KUNDU CHOWDHURY AND } APPELLANTS;
1929 OTHERS (JUDGMENT DEBTORS) }

AND

HEMENDRA KUMAR ROY AND OTHERS } RESPONDENTS.
Feb. 14. (DECREE HOLDERS) }

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Mesne Profits-Decree and Plaintiff silent as to future Profits—Mesne Profits recoverable to Date of Possession—Suit between zamindars jointly entitled—Land in khas Possession of Patnidar—Basis on which mesne Profits recoverable—Code of Civil Procedure (Act XIV. of 1882), ss. 211, 212.

Land to which three families of zamindars were entitled in certain shares became diluviated. On reformation the Government took possession and let it on a patni lease. One of the three families recovered the land from the Government and continued the patnidar in possession. Subsequently members of the other two families sued the family who had recovered the land and the patnidar claiming possession of their shares and mesne profits, which they valued down to the date of the plaint. In 1906 they were decreed possession and mesne profits to be ascertained in execution. The decree was finally affirmed by the Privy Council in 1917. Owing to the appeals the plaintiffs did not obtain possession until 1919:—

Held, (1.) that the plaintiffs were entitled to mesne profits down to the date when they obtained possession; (2.) that the liability of the zamindar defendants under the decree was not joint and several with the patnidar, and that under the explanation to s. 211 of the Code of Civil Procedure, 1908, the mesne profits recoverable from them should be based upon the rent they received from the patnidar, not upon the produce value of the land.

Decree of the High Court I.L.R. 53 C. 992 reversed on the second point.

CONSOLIDATED APPEAL (No. 156 of 1927) from two decrees of the High Court (June 9, 1926) varying decrees of the Subordinate Judge of Nadia.

The appeal arose in two execution proceedings in circumstances which appear from the judgment of the Judicial Committee.

The questions for determination were (1.) whether under a decree for possession and mesne profits obtained by the

*Present: Viscount DUNEDIN, LORD CARSON, and SIR CHARLES SARGANT.

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respondents in 1906 the mesne profits were recoverable only down to the date of the suit, or down to the time when they obtained possession, that time owing to appeals being about thirteen years later; and (2.) whether the zamindar appellants were liable jointly and severally with a patnidar in actual possession to pay mesne profits based on the produce value of the land, or were liable merely in respect of the rent they had received from the patnidar.

The Subordinate Judge held (1.) that on the terms of the decree the plaintiffs were not entitled to mesne profits for a period subsequent to the institution of the suit; (2.) that the zamindar defendants (the present appellants) were liable only on the basis of the rent which they had received.

The High Court by judgments reported at I.L.R. 53 C. 992 held to the contrary on both points. The learned judges (Cuming and Page JJ.) were of opinion on the second question that the present appellants were liable jointly and severally with those in actual possession and were joint tortfeasors with them; as some of the land had been let at a produce rent the Court held that it could assume that it was all so let.

The Code of Civil Procedure, 1882, which was in force at the date of the decree, makes provision for mesne profits by ss. 211 and 212.

1929. Feb. 12, 14. *Sir George Lowndes K. C.* and *E. B. Raikes* for the appellants. Upon the construction of the decree, in conjunction with the plaint, the plaintiffs were entitled to mesne profits only down to the date of the suit. Sect. 212, not s. 211, of the Code of 1882 applied. The High Court relied upon *Fakharuddin v. Official Trustee of Bengal*. (1) That case, however, was under the Code of 1859, the relevant provisions of which differed from ss. 211 and 212 of the Code of 1882. Secondly, if s. 211 applies, then under the explanation the appellants were liable only in respect of the rent paid to them. That was the only profit which they received; they acted reasonably in continuing the patni and not cultivating the lands themselves. The

(1) (1881) L.R. 8 I.A. 197.

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appellants were co-tenants with the plaintiffs. They were therefore not trespassers in law, nor joint tortfeasors with the patnidar. In *Pugh v. Ashutosh Sen* (1) the Board held that *Doe v. Harlow* (2), which was relied on in the High Court on that point, lays down no principle at all. In any case, the measure of liability was that prescribed by the explanation to s. 211.

Upjohn K.C. and *Dube* for respondents Nos. 1 a to 3. The judgment of the trial judge in 1906 shows that he treated the claim as including future mesne profits. The decree upon its true construction entitles the plaintiff to them: *Dhurne Narain Singh v. Bundhoo Ram* (3); *Fakharuddin v. Official Trustee of Bengal*. (4) The order for possession itself carries the right to mesne profits to the date when possession is given: *Lelanund Singh v. Luckmissur Singh*. (5) The mesne profits recoverable from the appellants were rightly based upon the produce value of the land. That clearly was the right basis as against the patnidar. The appellants were in law joint tortfeasors with him, and their liability under the decree was joint and several with him. That view was accepted by them in the High Court, and is not affected by s. 211.

Sir George Lowndes K. C. replied.

The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. This is a case which has arisen out of one of those curious effects of nature which have often been before the Board—namely, the behaviour of the Ganges. There were three families who, for brevity's sake, have been named the Kundu set, the Mukherjee set and the Roy set. They were three families of zamindars who were in joint possession of certain mauzas called Durlabhpur in Jirat and Hatikanda. They were in joint possession in law. It was quite true that they had a separate taujih number, but that makes no difference to the legal character of the possession. These properties disappeared under the Ganges.

(1) (1928) L.R. 56 I.A. 93. (3) (1869) 12 S.W.R. 74.

(2) (1840) 12 Ad. & E. 40. (4) (1881) L.R. 8 I.A. 197.

(5) (1870) 13 Moo.I.A. 490.

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After a considerable period of years they reappeared, and when they reappeared they were in juxtaposition to some property held by the Government. The Government assumed that the land which had come out of the Ganges was an accretion to their property, and proceeded to put tenants upon it, but after a certain time the zamindars woke up to the fact that it might be their property that had reappeared from under the Ganges, and, accordingly, they took the ordinary steps—namely, an application to the Court of the Collector. Originally the two sets, the Roy set and the Kundu set, made applications, but the Roy set did not persevere, and there is a copy of the order sheet in the Court of the Collector in which, dealing with the Roy application, it says: "The notice-givers took no steps to establish their right to the lands claimed by them as a reformation in situ. On the other hand the Kundu Babus of Mouri have succeeded in establishing that Government has no right to the mauzas of Jirat and Durlabhpur." Accordingly, there is on the other order sheet a certified copy of order of release in which the Collector says: "I accordingly order that the lands included within the revenue survey boundaries of Char Jirat and Durlabhpur as shown in exhibits A and A (2.) be released." That put the Kundu people in lawful possession of the whole of the lands. It is quite true that they, although in lawful possession of the whole of the lands, were not really in one sense in lawful possession, because they had, as regards the other two families, only a right to a 6 annas share, the other 10 annas share being in the right of the other two families.

When the Government had been there they had thought that the best way to deal with the land was to let it in patni to a person of the name of Srish. Srish seems to have worked the land well and settled cultivators upon it, and he paid his patni rent to the Government. When the Kundu family got possession of the land under the lease they thought that the best plan that they could adopt was to continue Srish, and continue Srish they did.

After a little while the other two families woke up to the fact that as the lands had been recovered, and as they had

J. C. a right to a 10 annas share of it, they had better make
 1929 effectual their right, and accordingly they raised action for
 GURUDAS that purpose. That suit was defended by the Kundus.
 KUNDU The first judge gave judgment in favour of the plaintiffs;
 CHOWD- then there was an appeal in which that judgment was
 HURY reversed, and then there was an appeal to the Privy Council,
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That suit was for the recovery of the land and mesne profits. The suit was brought against everybody who was found there; it was brought against the Kundus, the Government, and a certain gentleman connected with the Government who had had partial possession of land before the period at which the Kundus were readmitted and it was also brought against Srish, who was found to be the person in actual possession. The decree in that suit was as follows: "It is ordered that the claim of this suit be decreed with costs and mesne profits and interests against the principal defendants and the defendants subsequently added. . . . The amount of mesne profits to be ascertained in execution."

The questions that are now before their Lordships arose when the amount of mesne profits had to be ascertained in execution. Two questions arose in connection with that. The first is as to the period for which the mesne profits should be allowed. The terminus a quo, so far as these particular defendants are concerned (because it is only the Kundu defendants that are here), was, of course, when they were first readmitted to possession, but the terminus ad quem might either be the raising of the suit or the time when the plaintiffs got an order giving them the right to be on the lands. Upon that the High Court have held that mesne profits must go to the further period, and this appeal is first against that.

Their Lordships think that this matter is really decided by authority. "That the claim of this suit be decreed with costs and mesne profits" has been decided to mean profits up to the time of the plaintiffs' readmission to the land. The argument on the other side was that when you looked at

what was actually claimed in the plaint the plaint had said: "Suit for declaration of title to and for recovery of possession of immovable property and mesne profits, valued at Rs.7545," and then when you come to the statements, in para. 9, the value of the land is put at Rs.6156, and then it goes on to say: "The mesne profits amount to Rs.1389-5-8 as per accounts given below." Now, that Rs.1389-5-8 is only a calculation up to the time of the institution of the suit. Although that is so, inasmuch as the decree is "with costs and mesne profits," it has been held in many cases and cannot be gone back upon that s. 211 of the Code of Civil Procedure having said that: "When the suit is for the recovery of possession of immovable property yielding rent or other profit the court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first happens)," a decree in this form is an exercise by the Court of that power under s. 211. Their Lordships are, therefore, clearly of opinion that on this first point the appeal fails.

Now, the second point is: On what basis the mesne profits are to be computed. The same s. 211 gives an explanation of what "mesne profits" are. "'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits."

Undoubtedly in the lower Court the principal argument seems to have turned upon a contention which does not commend itself to their Lordships. It was argued seemingly that the true criterion was not what the person in possession got but what the person who was out of possession might have got if he had been there, and it was said that inasmuch as you were a zamindar you would not have cultivated yourself; you would have taken a rent; here is the rent which is given by Srish, and, therefore, that ought to be the proper criterion. That argument was quite rightly put aside.

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But then there is another argument. Mr. Upjohn wished their Lordships to think that this other argument, which will be stated presently, was never started until the parties got before this Board. Their Lordships do not think that can be said, because in the judgment of the High Court this was said: "The second question now arises for consideration—namely, upon what basis are such mesne profits to be ascertained? In this connection the respondents have relied upon two main contentions: (1.) That the plaintiffs are entitled to recover from the defendants only such profits as the plaintiffs using reasonable diligence could have made if they had been in possession of the lands, and inasmuch as the plaintiffs are either zamindars or patnidars and would not themselves have worked as cultivators of the land, they are only entitled to recover mesne profits upon a rental basis."

That is the argument which has already been mentioned as not being worthy of very much attention. But then the learned judge goes on: "(2.) That each of the judgment debtors is liable only for the portion of the mesne profits that he actually received or with reasonable diligence might have received during the period in which he was in wrongful possession: that is to say, the person in actual possession is liable only for the nett profit which he received after deducting working expenses."

Now, the question which was directly raised by the appellants here is this: They say: "We are only liable for what we really got—namely, what we got from Srish; allowing Srish to go on as he had done with the Government was perfectly reasonable; you cannot think that it was necessary for us to put out Srish and begin to cultivate ourselves, and therefore we, in the terms of the Code, are only liable for what we really got."

Mr. Upjohn has argued the case with his usual ability and more than his usual ingenuity, and it comes to this: He begins with the decree, and he says that was a decree for joint and several liability. Then he says: "These people really did not take this point sufficiently." Well, they may not have taken it sufficiently in the first Court, because their

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Lordships think they rather wandered into the question which they have already dealt with, but their Lordships think it is perfectly clear from what has been read of the judgment that they took it in their second point referred to by the High Court. Then the argument proceeds thus: The judgment was against them, and it was against them upon this theory that these people were all trespassers; not only were the Kundu defendants trespassers but Srish was a trespasser. He was put in by the Kundus; the Kundus had no real right, and, therefore, he had not a right. Accordingly as the decree was for joint and several liability you may take the mesne profits upon the calculation of what Srish got out of the land, and get decree against all the others for that amount. Their Lordships have great difficulty in looking upon Srish as a trespasser, or, for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed—namely, the lease from the Government. It is quite true in one sense that they were in wrongful possession because they were taking the whole profits, whereas they were only entitled to 6 annas of the profits and not to 16 annas of the profits. Be that however as it may their Lordships cannot accept this argument. They do not view the decree as a proper joint and several decree. They think it is to be construed *applicando singula singulis*. Let this test be taken. Suppose any one of the numerous defendants had refused to quit possession, could all the other defendants have been put in prison because that one defendant was in contumacy to the decree? What authority is there for saying that under such a decree as against any one particular defendant you are entitled to say: I will hold you liable not for the mesne profits which you got according to the terms of the Act, but for the mesne profits which somebody else got and with whom, under the decree, you are liable? Their Lordships think it would be the height of injustice to hold that, and they do not see that they are bound to hold it.

Therefore, their Lordships think that the basis of the judgment of the High Court here fails, and that dealing with

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these Kundu defendants, and with them alone, their liability is just exactly what it is said to be by s. 211 of the Code of Civil Procedure—namely, that which they themselves received —no case having been made that they by ordinary diligence could have got any more.

The result is that upon this second point their Lordships are of opinion that the appeal succeeds.

Their Lordships will, therefore, humbly advise His Majesty to declare that the mesne profits be allowed up to the date of the readmission of the plaintiffs to the land, but are to be calculated only on what the defendants actually themselves received as rent from the land let. There will be no costs either before this Board or in any of the Courts below, as this has been a divided success, and any costs paid must be repaid.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Watkins & Hunter; Vallance & Vallance.*

NARSINGH PARTAB (PLAINTIFF)	APPELLANT;	J. C.*
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MOHAMMAD YAQUB AND OTHERS } (DEFENDANTS)	RESPONDENTS.	March 15. —

ON APPEAL FROM THE CHIEF COURT OF OUDH.

Mortgage—Construction of Mortgage—Mixed Simple and Usufructuary Mortgage—Mortgagor failing to give Possession—Remedy of Mortgagee Transfer of Property Act (IV. of 1882), ss. 67, 68 and 98.

A mortgage executed in 1923 to secure an advance of Rs.30,000 and interest stated by clause 2 that a half share in certain villages had been hypothecated in lieu of the principal and interest, and that in order to pay the interest possession had been delivered to the mortgagee; clause 3 provided that the principal was to be repaid within thirty-five years; clause 4, that the mortgagors should remain entitled to eject tenants, to enhance rents, to cultivate the land and to issue leases, and that if there should be a surplus after paying the interest it should be applied to paying the principal; clause 5, that if at the appointed time the mortgagors should not repay, the mortgagees should have power to realize the sum due by sale; clause 7, that if the mortgagees were deprived of possession then the liability should rest with the mortgagors. The Rs.30,000 was duly advanced, but the mortgagors failed to deliver possession of the mortgaged property. In 1924 the mortgagee sued to realize the sum due by sale, or for a money decree:—

Held, that the mortgage, upon its true construction, was not an anomalous mortgage to which s. 98 of the Transfer of Property Act, 1882, applied, but was a mixed simple and usufructuary mortgage; that the money owing had become payable by s. 68 by reason of the failure to give possession, and that consequently the mortgagee had a right under s. 67 to a decree for sale.

Decree of the Chief Court varied.

APPEAL (No. 112 of 1927) from a decree of the Chief Court of Oudh (October 12, 1926) varying a decree of the Subordinate Judge of Rai Bareli.

The appellant brought a suit to enforce a mortgage of April 8, 1923, by sale of the mortgaged property, or for a money decree for the amount owing. The Subordinate Judge made a decree in the usual form for the payment of the mortgage money by sale. He held that the mortgage in question was a combination of a simple mortgage and an usufructuary

*Present: LORD SHAW, LORD TOMLIN, and SIR LANCELOT SANDERSON.

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mortgage so that it was governed by s. 68 of the Transfer of Property Act (Act IV. of 1882). The Chief Court, differing from the Subordinate Judge, held that the mortgage was an anomalous mortgage governed by its own terms by virtue of the provisions contained in s. 98 of the Act, so that the only remedy to which the mortgagee was entitled was for possession of the mortgaged property under the terms of the mortgage deed.

The terms of the mortgage appear from the judgment of the Judicial Committee.

1929. Feb. 22. *Dunne K.C.* and *S. Hyam* for the appellant.

The respondents did not appear.

March 15. The judgment of their Lordships was delivered by LORD TOMLIN. This is an appeal by the plaintiff in the suit from a decree dated October 26, 1926, of the Chief Court of Oudh which varied a decree dated August 13, 1925, of the Court of the Subordinate Judge at Rai Bareli.

On April 8, 1923, a mortgage, which was duly registered, was executed by the first two defendants in favour of the third defendant to secure an advance of Rs.30,000 carrying interest at the rate of 5 annas and 1 pie per cent. per month.

By clause 2 of this mortgage it was stated that an 8 annas share in certain villages had been hypothecated in lieu of the principal mortgage money and interest and in order to pay the annual interest on the mortgage money possession over the hypothecated property had been delivered to the mortgagee, who, after paying the revenue, should appropriate the surplus profits to the extent of the annual interest.

By clause 3 the mortgage money was promised to be repaid within thirty-five years; and at the stipulated time when in Khali fasl in the month of Jeth, or at any other time, the mortgagors should pay money to the mortgagee the mortgaged property should become redeemed.

The fourth clause of the mortgage contained a further provision that the mortgagors should remain entitled to

eject tenants, to enhance rent, to cultivate land, and to issue leases and after enhancement and payment of interest if there be left any surplus, or if the mortgagors pay any year or each year any amount of money, then that money should be deemed to have been paid towards the principal and interest on the money paid should be deducted; and that the mortgagee like the mortgagors, should possess all the remaining powers during the period of his possession.

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By clause 5 it was provided that if the mortgagors fail to pay the mortgage money and fail to redeem the mortgage at the appointed time, then the mortgagee should have power to realize the money due to him by sale of the mortgaged property; and that if the mortgaged property should be found to be insufficient to satisfy the full demand then the mortgagee should be entitled to recover the balance from the other properties of the mortgagors. Clause 7 provided that if on the claim of any person any part or whole of the mortgaged property were to go out of the mortgagee's possession, or if there were to arise any disturbance in the mortgagee's possession, then the liability therefor should rest with the mortgagors.

The money was duly advanced, but the two first defendants failed to deliver possession of the mortgaged property to the third defendant. By a deed of transfer dated April 17, 1924, and registered on April 22, 1924, the third defendant transferred the mortgage and her rights thereunder to the plaintiff.

On May 14, 1924, the plaintiff filed a petition of plaint against the three defendants in the Court of the Subordinate Judge at Rai Bareli, claiming a decree for recovery of Rs.30,000 and Rs.1250.15.6 for interest by sale of the mortgaged property and if for any reason a decree for sale could not be passed then a simple money decree for Rs.31,250.15.6.

The first two defendants filed their written statement on August 28, 1924, claiming that the suit ought to be dismissed (inter alia) for the following reasons—that the mortgage deed was not such as might legally, if the mortgagee did not get possession, entitle him to obtain a simple money decree.

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By his judgment, dated August 13, 1925, the Subordinate Judge found on all issues of fact in favour of the plaintiff and in particular he found that the first two defendants had failed to put the mortgagee in possession and had remained in possession themselves, and as to the issue whether the plaintiff was entitled to sue for a sale or a money decree he held that the plaintiff was entitled to a sale decree under s. 68 of the Act and passed a decree giving the two first defendants till February 13, 1926, to redeem the property at the amount for principal interest and costs mentioned in the decree and in default of payment on or before that date a sale was ordered.

On November 17, 1925, the first two defendants appealed to the Chief Court of Oudh at Lucknow.

The Court allowed the appeal, setting aside the decree of the Court below and in lieu thereof granting a decree for possession of the mortgaged property.

The learned judges of the Chief Court held that the mortgage in question was an anomalous mortgage and not a combination of a simple mortgage and an usufructuary mortgage, and therefore that s. 68 of the Act was excluded and s. 98 of the Act applied, under which the plaintiff was only entitled to a decree for possession in accordance with the terms of the mortgage deed; their view of the mortgage deed was that under it the mortgage money was not recoverable before the expiry of thirty-five years and therefore that the mortgagee's right to enter into possession and the mortgagors' obligation to deliver possession must be given effect to.

The plaintiff obtained leave to appeal to His Majesty in Council and appealed accordingly. On the appeal none of the defendants appeared.

In order to appreciate the point to be determined it is necessary to refer to the relevant sections of the Transfer of Property Act.

A simple mortgage and an usufructuary mortgage are defined in s. 58 (b) and (d) of the Act, as follows:—

“ 58 (b). Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

“ 58 (d). Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.”

Sect. 67 of the Act provides as follows: “ In the absence of a contract to the contrary the mortgagee has at any time after the mortgage-money has become payable to him and before a decree has been made for the redemption of the mortgaged property or the mortgage-money has been paid or deposited as hereinafter provided a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property or an order that the property be sold.”

Sect. 68 of the Act is as follows: “ The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only: (a) Where the mortgagor binds himself to repay the same; (b) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor; (c) Where, the

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mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person."

Sect. 98 of the Act is headed "Anomalous mortgages" and is in the following terms: "In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage."

The first question is whether upon its true construction the mortgage is one which is outside the scope of s. 98, and secondly if it is outside the scope of that section to what remedy the plaintiff is entitled having regard to the provisions of ss. 67 and 68.

In their Lordships' opinion the mortgage is a combination of a simple mortgage and an usufructuary mortgage. The only clause in the mortgage which presents any difficulty is clause 4, but that clause appears in their Lordships' view at most only to enable the mortgagors to act as manager without in any way detracting from the effect of clause 2, which entitled the mortgagee to possession. On this view of the construction of the mortgage deed s. 98 of the Act has no application to the case.

It is plain according to the findings of the Subordinate Judge that the first two defendants have failed to discharge their obligation of making over possession to the mortgagee and have thereby deprived the mortgagee of part of his security and in these circumstances their Lordships are of opinion that under s. 68 the money has become payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable under s. 68 their Lordships are further of opinion that under s. 67 a decree for sale can be made. It would indeed be a startling result of the legislation if in such a case as this where a default has been

made by the mortgagors of a kind which materially affects the mortgagee's security there existed no remedy for the immediate enforcement of the mortgage.

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In the result, therefore, their Lordships are of opinion that the appeal should be allowed with costs and the order of the Subordinate Judge restored with the date for redemption extended for six calendar months from the date of His Majesty's Order hereon and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

SATISH CHANDRA JOARDAR AND OTHERS,

(PLAINTIFFS) } APPELLANTS; J. C.*

AND

BIRENDRA NATH ROY (DEFENDANT). RESPONDENT.

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June 6.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Limitation—Dispossession—Land emerging after Diluvion—Constructive Possession of Owner till Dispossession—Evidence of Possession by others—Order for Mesne Profits—Indian Limitation Act (IX. of 1908), Sch.I., art. 142.

In 1915 the High Court made a decree declaring the title of the plaintiffs to a plot of land which had emerged shortly before 1905 after many years' diluvion. A decree for possession was not made, the High Court finding that in 1908, when the suit was instituted, there had been no dispossession by the defendants. On June 23, 1917, the plaintiffs sued the same defendants for possession of the plot. The defendants contended that the suit was barred by the Indian Limitation Act, 1908, Sch. I., art. 142, as the plaintiffs had been dispossessed by third parties against whom, on June 27, 1905, the defendants had obtained an order for possession of the plot under a decree ejecting the third parties from a larger area. There was no direct evidence of possession of the plot by the third parties, but the defendants relied upon an order against them for mesne profits based upon the plot having been cultivable in 1904:—

Held, that the order for mesne profits was not evidence that the third parties cultivated or were in possession of the plot, and that the plaintiffs remained in constructive possession until dispossessed by the defendants which, by the decree of 1915, took place within twelve years of the present suit; the suit therefore was not barred by art. 142.

Decree of the High Court reversed.

*Present: LORD BLANESBURGH, LORD TOMLIN, and SIR JOHN WALLIS.
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APPEAL (No. 69 of 1928) by special leave from a decree of the High Court (March 5, 1926) reversing a decree of the District Judge of Krishnagar (June 30, 1925) which reversed a decree of the Subordinate Judge of Nadia.

The suit was brought by the appellants on June 23, 1917, against defendants, including the respondent, described as the Natores, for possession of a plot of land of 155 bighas which had emerged after diluvion shortly before 1905.

The plot in suit formed part of an extensive mahal, which had been diluviated for many years, and had emerged later than the rest of the mahal. In a suit commenced in 1897 the Natores had ejected defendants described as the Tagores from the mahal, and on June 27, 1905, had obtained against them an order for possession of the plot now in suit; they had also recovered mesne profits against the Tagores, based upon the report of a commissioner which, as they contended, showed that for the year 1904 the mesne profits payable included a sum in respect of the plot. In a suit brought in 1908 by the appellants' father against the Natores claiming title to the mahal, the High Court in 1915 held that the Natores had acquired a title by adverse possession to the land other than the plot now in question, but declared the title of the appellants to that plot; an order for possession was not made, the Court finding that the defendants (the Natores) had not taken possession in 1908 when the suit was commenced, and being of opinion that possession of the plot had not been asked for in the suit.

In the present suit the appellants claimed under the decree of 1915; they also alleged a dispossession less than twelve years before suit. The defendants pleaded that the suit was barred by limitation, also by res judicata and under Order II., r. 2.

The Subordinate Judge at the first hearing dismissed the suit as barred by res judicata and under Order II., r. 2. The District Judge reversed that decision and remanded the suit for trial, and the High Court (Richardson and Suhrawardy JJ.) affirmed that decision.

On the remand the Subordinate Judge dismissed the suit, holding that it was barred by limitation. The District Judge

reversed that decision, but the High Court (Cuming and Page JJ.) restored the decree of the trial judge.

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The facts, and the grounds of the decisions of the High Court, appear fully from the judgment of the Judicial Committee.

1929. April 19, 22, 26, 29. *Dunne K.C. and A. M. Talbot* for the appellants. The suit was not barred by the Indian Limitation Act, 1908, Sch. I., art. 142. The High Court by its judgment in 1915 found that there had been no dispossession of the plaintiffs before 1908, and on that finding refused them an order for possession. The date of the order for possession against the Tagores—namely, June 27, 1905—is the earliest date at which it can be contended that the defendants took possession, and that is just less than twelve years before the present suit. The High Court in 1915 found that there had been no dispossession by the Tagores at an earlier date; in any case there was no evidence in this suit of possession by the Tagores. The report of the commissioner as to mesne profits was not admissible as against the plaintiffs, who were not parties to those proceedings. In any case it is evidence of no more than that the lands were cultivable earlier than 1905, and does not show that the Tagores were in actual possession. The title being in the plaintiffs they remained in constructive possession during the diluvion and until there was an actual possession by somebody else: *Kumar Basanta Roy v. Secretary of State for India*. (1) Further, the title of the plaintiffs was established by the decree of 1915. It was therefore not necessary for them to show a dispossession twelve years before suit; the onus was upon the defendants to displace the title so established by proof of twelve years' adverse possession under art. 144: *Radha Gobind Roy v. Inglis* (2); *Secretary of State for India v. Rama Row*. (3) The defendants failed so to prove. The issues as to res judicata and under Order II., r. 2, were decided in the plaintiffs' favour.

(1) (1917) L.R. 44 I.A. 104, 113. (2) (1880) 7 CalL.R. 364, 368 (P.C.).
(3) (1916) L.R. 43 I.A. 206.

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De Gruyther K.C. and *Parikh* for the respondent. If in the suit of 1908 possession of the plot was claimed the present suit is barred by res judicata, as possession was refused; if they did not then claim possession the suit is barred by Order II., r. 2. In any case the suit is barred by art. 142 of the Limitation Act. The appellants by their plaint alleged a dispossession and the onus was upon them to prove that it was within twelve years of the suit: *Muhammad Amanulla Khan v. Badan Singh* (1); *Dharani Kanta Lahiri v. Gabar Ali Khan*. (2) The order of June 27, 1905, obtained against the Tagores itself raises a presumption that the Tagores were in possession previously. The report of the commissioner shows that the mesne profits recovered from the Tagores included a sum for 1904 or earlier in respect of this very plot. That was an official report as to possession of the land and was admissible against everybody: *Dinomoni Choudhrani v. Brojo Mohini Choudhrani*. (3) The whole of the evidence is not upon the record; if there is a doubt as to possession by the Tagores the case should be remanded.

Dunne K.C. in reply. In the 1908 suit it was not held that if the plaintiffs were not in possession of this plot they were not entitled to possession. The High Court found that in 1908 nobody was in actual possession. *Dinomoni's* case (3) referred to a police report made under Act X. of 1872 and does not apply.

June 7. The judgment of their Lordships was delivered by SIR JOHN WALLIS. The present suit relates to a triangular piece of land forming the southern portion of the mauza Bhairabpara, a small permanently settled estate consisting of a long narrow strip of land, liable to diluvion by the river Padma on the north and by the river Gorai on the south. At times the whole mauza has been completely submerged, and when above water would appear to have been the subject of incessant litigation.

About the year 1882 it was totally submerged, and when it reformed and became fit for cultivation, the Tagores, who

(1) (1889) L.R. 16 I.A. 148. (2) (1912) 17 Cal.W.N. 389 (P.C.).

(3) L.R. 29 I.A. 24.

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are the owners of an adjoining estate, entered upon it. Thereupon the present defendants, the Natores, who own another adjoining estate, instituted a suit, No. 127 of 1897, in the Court of the Subordinate Judge of Nadia against the Tagores, claiming that the lands on which the Tagores had entered belonged to their own mauza of Keshapore or Bhairabpara. For the purposes of that suit a map was prepared by a commissioner, Mr. J. N. Roy, which showed that in 1898, at the date of the report, the river Gorai had moved northward and then ran through the mauza of Bhairabpara, thus separating the southern portion, which is the subject of the present suit, from the rest of the mauza.

In that suit the Subordinate Judge held that the plaintiffs had proved their title, but that the suit was barred except as to 350 bighas.

On appeal the District Judge, whose decree was affirmed by the High Court on second appeal, held that the defendant Tagores had no title, that the plaintiffs had shown that Bhairabpara was identified with their mauza of Keshapore, and, even if it were not, they had acquired a title by adverse possession through their jotedars or tenants. He accordingly gave the plaintiffs a decree for possession and mesne profits.

In the execution of this decree the Natores, the present defendants, were put in possession on June 26, 1905. They were also awarded mesne profits on the estimated cultivable lands in the mauza in accordance with the report of a commissioner, which was duly confirmed by the Court.

On April 15, 1908, the present plaintiffs' father, claiming as patnidar under the Mozumdars, another family who, he alleged, were the owners of the mauza of Bhairabpara, instituted suit No. 308 of 1908 in the same Court against the Natores, the present defendants, for possession and mesne profits, alleging that, when the lands of the mauza had reformed and had become fit for cultivation and he attempted to take possession, he was obstructed by the defendants, who had taken possession in execution of their decree against the Tagores in the suit already mentioned.

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The Subordinate Judge held that the plaintiff had proved his title, but that he was barred as to 600 bighas, forming the northern portion of the mauza, the defendants having acquired a title by adverse possession for twelve years before the last submergence of the mauza.

The defendants appealed, and the plaintiff filed cross-objections, and, while the appeal was pending, the plaintiff died, and his sons and legal representatives, who are the plaintiffs in the present case, were substituted for him.

On appeal the learned judges of the High Court were of opinion that it was impossible to locate the 600 bighas, which the Subordinate Judge had held to have been in possession of a factory holding under the defendants. They came to the conclusion, however—it is said, for the respondents, quite wrongly—that the defendants in their 1897 suit against the Tagores had not claimed the southern triangle of Bhairabpara, which the learned judges said was then in the bed of the river Gorai, and hence they concluded that the factory holding under the defendants had been in possession of the whole of Bhairabpara minus the small southern triangle, and they accordingly held the suit to be barred except as to the southern triangle.

On the footing that the defendants in their 1897 suit had neither asked for nor obtained possession of the southern triangle, they found that the defendants had not been shown to have been in possession of it, and that consequently a decree for possession and mesne profits should not be passed against them, but that the plaintiffs should have a declaration of their title to the southern triangle.

It will, however, be better to state their conclusions in their own language, as so much has turned on it in the present suit: “The defendants in their title suit against the Tagores in 1897 claimed the lands north of the then current Gorai river as their Kishorepur lands. They did not claim the triangular portion of Bhairabpara, which was then in the bed of the Gorai. The defendant got a decree accordingly, and we do not think that there is any satisfactory evidence definitely pointing to the possession of this triangular portion when it

reformed after northward progress of the Gorai; in fact, it was not claimed in the title suit of 1897. We think, therefore, that the decree in favour of the plaintiff must be confirmed to the triangular portion of mauza Bhairabpara to the south of the northern bank of the Gorai river, as shown in the map of J.N. Roy. The defendants retain the entire fruits of their decree against the Tagores. The present suit was brought expressly for the lands which the defendants obtained in execution of their decree against the Tagores. There was no allegation of dispossession in respect of any other lands, but the triangular portion was shown as disputed to the commissioner. The defendants in their written statement generally stated that mauza Bhairabpara was the name fraudulently given to their mauza Kishorepur and they also relied upon their decree against the Tagores as the basis of their possession. The decree, therefore, will be for a declaration of the rights of the plaintiff as Patnidar to that portion of Bhairabpara which is south of the northern bank of the Gorai, as shown in the map of J. N. Roy. The suit for recovery of possession of the lands decreed to the defendants in their title suit No. 125 of 1897 is dismissed. As the defendants, however, denied the title of the plaintiff to the portion in respect of which he gets a declaration, the plaintiff will be entitled to his costs in proportion to the area."

The plaint in that suit had claimed a declaration of title and a decree for possession and mesne profits of the mauza of Bhairabpara, and the judgment is to be read as finding, not that the southern triangle was not the subject of the suit in which case no declaration about it could have been given, but that the plaintiffs had only been dispossessed of the lands north of the Gorai as shown in the map made by J.N. Roy in 1898.

It would have been well if both parties had been content to accept this adjudication of their rights. Unfortunately, this judgment was the starting-point of fresh and protracted litigation. The plaintiffs were resisted by the defendants when they attempted to take possession, and having made futile attempts to yet possession in execution, a relief not

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J. C. given by the decree, and to amend the decree, which was in
 1929 strict accordance with the judgment, on June 23, 1917, they filed
 — SATISH the present suit for possession of the southern triangle, which,
 CHANDRA after having been twice before the Subordinate Judge, the
 JOARDAR District Judge, and the High Court, has now come before this
 v. Board from the decree of the High Court dismissing the suit.
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In the plaint in the present suit the plaintiffs ignored the fact that the High Court in the previous suit had refused to give them a decree for possession and mesne profits in respect of the southern triangle, and alleged in para. 5 that the High Court had held that the defendants had wrongfully taken possession of the southern triangle on 12th Assar, 1312 (June 26, 1905), in execution of their decree in the 1897 suit against the Tagores. They did, however, allege in para. 7 that, in consequence of the establishment of their right to the southern triangle in the previous suit, they were entitled to maintain a suit for possession and mesne profits, and in para. 8 they stated their causes of action as having arisen on the 12th Assar, 1312 (June 26, 1905), when the defendants took wrongful possession, and on May 8, 1917, when their execution petition in the previous suit for possession of the southern triangle was dismissed.

The case first came before the Subordinate Judge, who dismissed the suit, holding, with reference to the fifth issue, that it was barred under s. 11, explanation 5, of the Code of Civil Procedure, on the ground that possession had been asked for and refused in the previous suit.

On appeal the District Judge set aside the decree of the Subordinate Judge and remanded the suit for trial on the remaining issues, and his decree was upheld by the High Court on second appeal. Richardson J., who delivered the judgment of the High Court, observed that the plaintiffs had not framed their plaint artistically, as they had not contented themselves with a new cause of action based on the decree of the High Court in the suit of 1908, but had alleged dispossession in the year 1905, and had included this alleged dispossession anterior to that suit as part of the cause of action in the present suit. He then proceeded to deal with the judgment of the High

Court as follows: "If, then, the judgment of the learned judges is referred to, it is obvious that the learned judges did not decide that if the plaintiff was not in possession, he was not entitled to possession. The learned judges put their own construction on the pleadings and they formed their own conclusions as to the facts. It appears to me that the parties to the present suit are as much bound by the learned judges' construction of the pleadings and conclusions of fact as they are by the decree itself. Whether they were right or wrong is now immaterial. The decree follows from the reasons given for it, whether they were right or wrong, and must be understood and interpreted in the light of those reasons. The judgment, standing as it does, the parties are governed by it and are estopped from making averments which would be contrary to the record. The plaintiffs' true cause of action in the present case is the High Court decree of 1908, coupled with the fact that they are out of possession. Allegations in the plaint which go beyond this cause of action may be regarded as surplusage."

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In spite of this clear pronouncement the Subordinate Judge, when the case went back to him on remand, held that the suit was barred under art. 142, as the defendants and the Tagores before them had been in continuous possession for more than twelve years before the institution of the present suit in June, 1917, thus ignoring the finding of the High Court in the previous suit that neither the Tagores nor the defendants had been in possession before June, 1908, when that suit was filed.

On appeal the District Judge applied art. 144 instead of art. 142. Treating the question as one of adverse possession under art. 144, he held that the defendants were not entitled to tack on the Tagores' possession to their own for the purposes of the article. In the result he allowed the appeal and decreed the suit.

The case then went to the High Court on second appeal, when Cuming J. agreed with the Subordinate Judge that the suit was barred under art. 142 and should be dismissed. Page J. concurred in allowing the appeal and dismissing the

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suit, but on different grounds. After referring to the judgment of the High Court in the previous suit and to the judgment of Richardson J. in this suit, he observed: "Now the matter stands thus: the plaintiffs have been declared entitled to the triangular portion in dispute; but up to 1908, the date of the title suit brought by the plaintiffs against the Natores, it must be taken that there is no evidence, upon which the Court can rely, to justify a finding that the defendant respondent, the Natores, or anybody else, were in actual possession of this 155 bighas."

It was unnecessary for the plaintiffs to prove "actual possession" in the sense of occupation after the submergence, as their possession in law continued until they were dispossessed. In the opinion of their Lordships, as already stated, the finding on which the judgment of the High Court in the previous suit was based was that there was no such dispossession prior to April 15, 1908, when that suit was filed. Whether that finding was right or wrong, it is res judicata, and the defendants are estopped from questioning it, and it necessarily follows that the present suit which was filed within twelve years was in time.

Page J. was apparently of opinion that the suit was not barred, but he held it must be dismissed, as there was no evidence that the defendants had taken possession between 1908, the date of the earlier suit, and 1917, the date of the present suit. No such evidence was needed, as it was common ground and expressly admitted in the written statement that the defendants were in possession in June, 1917, when the present suit was filed. This being so, the plaintiffs, having established their title in the previous suit, and not being barred by limitation, are entitled to a decree.

Further, even if the defendants could be heard to say that the plaintiffs were dispossessed by them for 11 years 11 months and 27 days from June 26, 1905, down to the institution of the present suit, their Lordships are of opinion that there is no evidence to support the finding of the Subordinate Judge, which the District Judge apparently accepted, that prior to June 26, 1905, the Tagores were in possession of the

southern triangle. It is no doubt the case that the defendants recovered mesne profits in their suit of 1897 against the Tagores in respect of a tract of land which included the southern triangle, but the report of the commissioner was based on the finding that the lands in question had again become culturable after the diluvion, and not on the ground that they had been actually cultivated. The commissioner's report, on which the learned judge relied, is not evidence of dispossession by the Tagores, and their Lordships have not been referred to any other evidence in support of such a finding. It must therefore be held that it is not shown that the plaintiffs were dispossessed by the Tagores prior to June 23, 1905, and, indeed, it was held in the suit of 1908 that the Tagores had never been in possession of the southern triangle. On this ground also the suit must be held not to be barred.

For these reasons their Lordships are of opinion that the appeal should be allowed, the decree of the High Court reversed, and the decree of the District Judge restored, with costs throughout, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *W. W. Box & Co.*

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J. C.* RADHOBA BALOBA VAGH AND OTHERS
 1929 (PLAINTIFFS) } APPELLANTS;
June 14. AND
 ABURAO BHAGWANTRAO SHIROLE }
 AND OTHERS (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Limitation—Hindu Law (Partition)—Exclusion from Joint Family—Voluntary non-residence with Family—Maintenance and Education not contributed to—Absence of Intention to exclude—Indian Limitation Act (IX. of 1908), Sch. I., art. 127.

In 1898 a member of a joint Hindu family, whose father and mother had both died and who was then twelve years of age, went to reside with his maternal uncle, and never afterwards returned to the joint family residence. The joint family did not contribute to the expenses of his maintenance, education, or marriage, nor were they asked to do so. He came of age in 1904, and not till 1920 sued for partition. The defendants alleged, but failed to prove, that in 1906, and again in 1909, the plaintiff had demanded a share of the family property but had been definitely refused:—

Held, that the facts proved did not establish an intention to exclude the plaintiff from the joint family, and that the suit therefore was not barred by the Indian Limitation Act, 1908, Sch. I., art. 127. There was in 1909 a refusal by the defendants to partition at that time, but not a denial of the right; that was not an exclusion and moreover was within twelve years of the suit.

Decree of the High Court reversed.

APPEAL (No. 98 of 1927) from a decree of the High Court (February 17, 1925) reversing a decree of the Subordinate Judge of Poona (January 22, 1923).

The suit was brought by the appellants in 1920 against the respondents for a ninth share of property which was in their possession as joint family property. They claimed part through the third appellant Nana. The respondents denied that Nana was a member of their joint family, but on appeal to the High Court they withdrew that defence and relied on the Indian Limitation Act, 1908, Sch. I., art. 127, alleging that they had excluded Nana from the joint family and that that exclusion was known to him more than twelve years before the suit.

*Present: LORD CARSON, SIR LANCELOT SANDERSON, and SIR BINOD MITTER.

The Subordinate Judge made a decree for the plaintiffs, but the High Court (Macleod C.J. and Coyajee J.) held that the suit was barred by art. 127.

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1929. May 2, 3, 6. *Dunne K.C.* and *E.B. Raikes* for the appellants. The onus was upon the respondents to prove an intention by them to oust Nana from the joint family, and that Nana knew of that intention more than twelve years before the suit. No act or statement definitely refusing Nana his rights was proved. The facts that Nana chose to live apart, and that he had received no benefit from the joint family property, did not show an exclusion within art. 127. There is no obligation to allow maintenance to a member who chooses not to live with the family. [Reference was made to *Hari v. Maruti* (1); *Krishnabai v. Khangowda* (2); *Jivanbhat v. Anibhat* (3); *Sellam v. Chinnammal*. (4)]

De Gruyther K.C. and *Parikh* for respondents Nos. 1 to 5. A definite exclusion of Nana in 1906 was proved. But in any case the undisputed facts show an intention to exclude him, and it is a necessary inference that he knew of that intention more than twelve years before the suit. "When a person is not in possession of any joint property, and does not receive any of the proceeds of the property, he may be said to be excluded from the joint property": *Jaganatha v. Ramabhadra*. (5) That view accords with the judgment of the Board in *Rai Raghunath Bali v. Rai Maharaj Bali*. (6) A comparison of the Limitation Act of 1877 with earlier Limitation Acts shows that proof that a claim was made and refused is now not essential to establish an exclusion. [Reference was made also to *Ram Lakhi v. Durga Charan Sen* (7); *Ramcharan Narayan v. Narayan Mahadev* (8); *Muttakka v. Thimappa*. (9)]

Dunne K.C. replied.

(1) (1882) I.L.R. 6 B. 741.

(5) (1888) I.L.R. 11 M. 380, 392.

(2) (1893) I.L.R. 18 B. 197, 202.

(6) (1885) L.R. 12 I.A. 112, 115.

(3) (1896) I.L.R. 22 B. 259.

(7) (1885) I.L.R. 11 C. 680, 682.

(4) (1901) I.L.R. 24 M. 441.

(8) (1886) I.L.R. 11 B. 216.

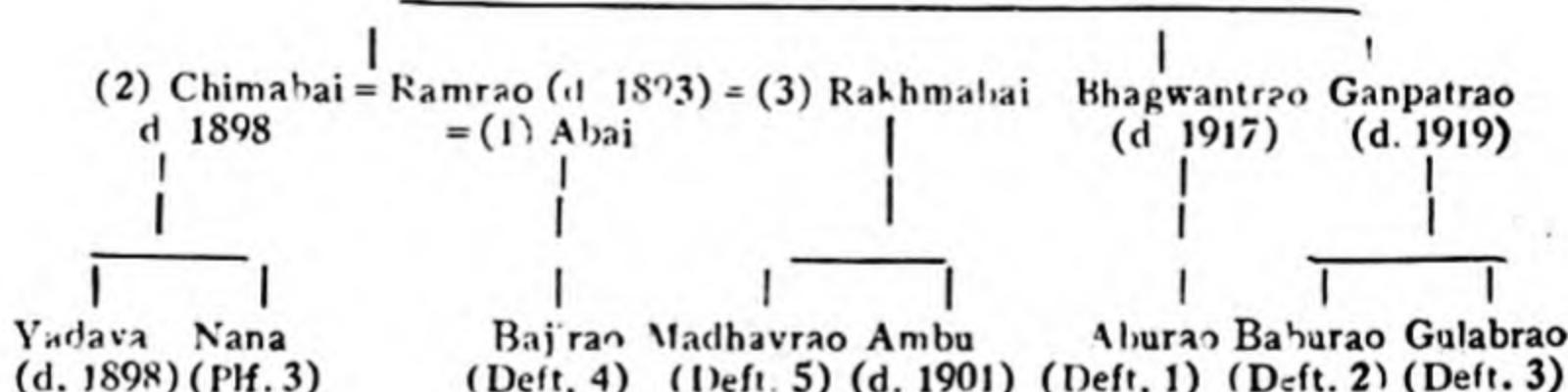
(9) (1891) I.L.R. 15 M. 186, 192.

J. C. June 14. The judgment of their Lordships was delivered by
 1929 SIR LANCELOT SANDERSON. This is an appeal by the
 RADHOBA plaintiff's against a decree of the High Court of Judicature
 BALOBA of Bombay, dated February 17, 1925, which reversed a decree
 VAGH of the Subordinate Judge of Poona, dated January 22, 1923.
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 BHAGWANT- The plaintiffs brought the suit for a declaration that the
 KAO immovable and movable properties mentioned in the plaint
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 plaintiff, Nana Ramrao, and the defendants, and that the
 plaintiff Nana had a one-ninth share in the said properties,
 for partition and other consequential reliefs.
 —

It appears that by a deed, dated June 6, 1910, Nana sold
 his one-ninth share in certain of the properties mentioned in
 the plaint for Rs.1500 to the father of the first and second
 plaintiffs. The father of these plaintiffs died, and it was
 alleged that after his death—namely, on or about August 13,
 1919—Nana obtained a further sum of Rs.500 from the first
 and second plaintiffs, and that the first and second plaintiffs
 had thus become the owners of Nana's one-ninth share of
 the property described in schedule B of the plaint. Con-
 sequently the first and second plaintiffs were joined with
 Nana as parties in the suit for partition.

The pedigree relied upon by the plaintiffs was as follows:—

RAJARAM (d. 1900).



The defence of the first five defendants was twofold: they
 alleged—(1.) that Nana was not the son of Ramrao, that
 Chimabai, the mother of Nana, was of a wicked nature, and
 was driven out of the house by Ramrao; that Nana was
 never joint with the defendants, and that he was not a
 member of the joint family. (2.) That the suit was barred
 by the law of limitation.

It was alleged that, after attaining majority, Nana made an attempt to get a share in the property, that he was told in clear terms that he had no interests therein, and that his right was denied by the defendants, by his deceased paternal uncles, and others. No date for the alleged attempt by the plaintiff and the alleged denial of his interest was specified in the written statement of the first five defendants, but in the course of the evidence given on behalf of these defendants it was alleged that the date was 1905-1906 or 1906-1907.

The suit was instituted on July 24, 1920, and these defendants, relying upon art. 127 of Sch. I. of the Indian Limitation Act IX., 1908, alleged that the suit was barred by limitation.

The learned Subordinate Judge held that Nana was the son of Ramrao by his wife Chimabai and that there was no exclusion made to the knowledge of Nana. Consequently he made a preliminary decree in favour of the plaintiffs to the effect that the plaintiff Nana had a one-ninth share in the immovable and movable property therein mentioned, and he directed that the lands should be partitioned by the Collector. The learned judge, after dealing with certain incidental matters, directed that the defendants Nos. 1 to 5 should pay the plaintiffs' costs as well as those of the other defendants.

On the hearing of an appeal by the defendants to the High Court the finding of the learned Subordinate Judge as to the legitimacy of Nana was not disputed, and the only question argued before the High Court was whether Nana, the third plaintiff, had been excluded from the joint family property to his knowledge for more than twelve years before the date of the suit—namely, July 21, 1920.

The learned judges of the High Court allowed the appeal and dismissed the suit, but directed that there should be no order as to costs throughout. The ground of their decision was that the whole series of facts, beginning with 1898, when his mother died, showed that Nana's connection with the family had been severed and that he acquiesced in that severance. Their conclusion was that Nana was excluded from the joint family property from 1898, and that he must

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be taken to have been perfectly well aware of the fact in 1904, when he came of age.

The material facts of the case are as follows:—After the death of his first wife Abai, Ramrao married Chimabai, who became the mother of two sons, Yadava and Nana. Within a year of this second marriage and while Chimabai was living in the family dwelling-house, Ramrao married a third time, Rakhmabai being the third wife. It was found by the learned Subordinate Judge that Ramrao had a second son by Chimabai—namely, Nana, the third plaintiff, who was born in June, 1886. As already stated, this finding is not now disputed; but it is not immaterial to note that the case of the first five defendants was that Chimabai's second son was named Keshav, who was alleged to be dead. The learned Subordinate Judge held that Keshav was "a fabulous person."

The family dwelling-house of Ramrao and his joint family was at Bhamburda, and there is no doubt that up to 1886 Chimabai was living with her husband in the aforesaid family house. Apparently there was much friction in Ramrao's family, due, it is alleged, to the presence of Rakhmabai, and in the year 1886, soon after the birth of Nana, Chimabai and her two children were taken by her maternal uncle. Appa, with the consent of her husband Ramrao, to live with him at a place called Patas. Chimabai and her two sons lived with her maternal uncle until 1888.

On September 8, 1888, Chimabai sent what was called a "notice" in writing to her husband Ramrao, demanding maintenance for herself and her two children. The "notice" was as follows:—

"To Ramrao Bin Rajaram Shirole residing at Bhamburde, Taluka Haveli, District Poona.

"Notice is given by the undersigned as follows: You are my husband and you married a second wife afterwards, and consequently you could not make proper arrangement for my living (with you), and you were always troubling and beating me. Thereafter during the period of my delivery no proper arrangements were made, and consequently I became very ill. At that time my maternal uncle had come to Poona,

to whom you told that he should take me with him, as I was very ill. Therefore my maternal uncle took me to his place, i.e., at Patas. Even though $2\frac{1}{2}$ years have elapsed since then, you have never again inquired of me. Besides, I have two small children. You have not even cared for them, nor are you taking us to your place. You should, therefore, make arrangements for the maintenance of myself and my children from this day. This is in order. If you fail to do so, I shall take legal steps against you. You should send a reply to this Notice within fifteen days from to-day."

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The result of the "notice" was that Chimabai and her two children were brought back by Ramrao, or by one of his brothers acting on his behalf, to the family dwelling of Ramrao at Bhamburda, and Chimabai and her two sons lived there until Ramrao's death in 1893.

Chimabai and her two sons after 1893 continued to live in the family dwelling-house until 1898, when Chimabai and her elder son died of the plague. Chimabai died on February 23, 1898, and Yadava, the elder son, died on the following day. Nana's maternal uncle, Appa, went to Bhamburda for Chimabai's obsequies, and, with the consent of Bhagwantrao, the paternal uncle of Nana, he took Nana to his own home in the village of Sonavadi. At that time Nana was twelve years old.

It is material to note that this is the date at which, according to the judgment of the High Court, Nana's connection with the family was severed, and his exclusion from the joint family property began.

Nana lived with and was maintained by his maternal uncle, Appa, at Sonavadi, and assisted his uncle in his agriculture. Nana was illiterate. This is one of the facts relied upon by the first five defendants as showing that he was excluded from the joint family and the joint family property. It was, however, pointed out by the learned Subordinate Judge that when Nana's father died he was about seven years old and had not attained the school-going age. After his father's death, as the learned Subordinate Judge held, Rakhmabai

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ruled the family, and it was not the fault of Nana that he was not put to school.

In 1898 Nana was removed to the house of his maternal uncle at Sonavadi, where there was no vernacular school, although there appeared to have been a school at Dhond, to which Sonavadi boys used to go.

It was alleged by the first five defendants, as already stated, that in 1905 or 1906 Nana went to Bhamburda and demanded a share of the family property, and that he then received a definite refusal from some of the members of the joint family. These defendants relied on this alleged incident as evidence of an exclusion from the joint family property at that time. The learned Subordinate Judge said that he did not believe the witnesses called to prove the above mentioned alleged demand and refusal in 1905 or 1906, and he held that Nana's demand for a share was not made until 1909, when it was refused, and that, consequently, the suit was in time. The learned judges of the High Court came to no definite decision as to the alleged incident of 1905-1906, but based their decision upon the general evidence in the case.

Their Lordships' attention was drawn to the evidence, upon which the first five defendants relied, to support the allegation that it was in 1905 or 1906 that Nana demanded a share of the joint family property and was refused. They are clearly of opinion that the learned Subordinate Judge's decision in this respect was right, and that there was no satisfactory evidence upon which it could be held that in 1905 or 1906 Nana made a demand for a share of the property and was refused by the members of the joint family.

Nana was married in or about 1908. His marriage took place at Sonavadi at the same time as the marriage of Appa's brother, and Appa's evidence was that Nana's marriage caused no additional cost. It is clear that no application was made by or on behalf of Nana to the members of his joint family for any assistance towards his marriage expenses. About two years after his marriage Nana began to live separately, and he then got some land, which he rented from the Government, at Sonavadi.

The plaintiffs' case was that in 1909 Nana went to Bhamburda and saw Bhagwantrao, who was the eldest surviving brother of Ramrao, and presumably at that time the karta of the family, as Ramrao died in 1893 and Rajaram died in 1900. Nana's evidence was to the effect that at this interview Bhagwantrao advised him to continue joint and not to demand a separate share; but that he, Nana, insisted on a partition.

Then, it was alleged, Bhagwantrao promised to arrange an advance of money for Nana, and that he took Nana to Baloba Narayan Vagh, the father of the first two plaintiffs, and that he obtained the sum of Rs.1500 from Baloba Narayan Vagh. Nana alleged that Bhagwantrao, although still persisting in his refusal to partition the property, did not deny Nana's share in it. There is no doubt that Nana did obtain Rs.1500 from Baloba Narayan Vagh, the father of the first two plaintiffs, though, according to the deed of sale, to which reference has already been made, the said sum was not obtained until June, 1910.

On June 6, 1910, Nana executed the deed of sale in favour of Baloba Narayan Vagh, the father of the first two plaintiffs. It was recited therein that the properties included in the deed were ancestral and belonged to the joint family of Nana's father and uncles, that Nana had a one-ninth share therein, and the amount of the consideration was Rs.1500.

The deed contained the following recital: "I was six or seven years old when my father died. After my father's death my mother Chimabai and I used to live with my uncle for some days. But owing to step-motherly relations there were quarrels and disputes between my mother and other members of the family. Thereafter my mother died. Therefore I used to live with my maternal uncle, Appa Bahirji Patil Pawar, who resides at Sonavdi, Taluka Bhimthadi. About a year ago I came to Poona and asked my uncles and my stepbrothers to effect a partition and to allot to me my one-ninth share of our ancestral property. But they refused to give (my) share. I am not a permanent resident in Poona, and as I follow the occupation of a cartman at Mouje Sonavdi Peta Dhond,

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J. C. I cannot live at Poona and I cannot afford to fight a suit
 1929 (in a court of law). Therefore I have received from you
 — Rs.1500—in words, rupees fifteen hundred—as price of my
 RADHOBA one-ninth share of the aforesaid property and have sold to
 BALOBA you my right of ownership, title and interest with respect
 VAGH to the one-ninth share of the said property."

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It was argued on behalf of the defendant-respondents that the recitals in the above mentioned deed were not admissible as evidence against them on the issue whether Nana demanded a share of the property in 1909. It was submitted that it did not come within s. 157 of the Indian Evidence Act, Act I. of 1872, upon which the learned counsel for the plaintiffs relied.

It may be that this particular statement does not come within s. 157 on the ground that it was not made at or about the time of Nana's alleged interview with Bhagwantrao in 1909, but, in their Lordships' opinion, the deed is admissible in evidence as corroboration of the evidence given by Nana and his witnesses upon material matters, as, for instance, the statement by Nana that Bhagwantrao said he had no money, but that he would "find a creditor" for Nana, and that Bhagwantrao did take him to Baloba Narayan Vagh. In other words, the deed is some evidence of the act alleged to have been done in pursuance of Nana's interview with Bhagwantrao, and it is material on the question whether the evidence of Nana and his witnesses on this part of the case can be relied upon.

While dealing with this part of the case, their Lordships observe that it is difficult to understand how Nana would have been able to negotiate the arrangement culminating in the deed of June 6, 1910, without assistance from some one.

He was illiterate, he had been living away from Bhamburda since he was a boy, he would not have sufficient knowledge of his own to enable him to describe the parcels of immovable property which are so fully set out in the deed, and it is extremely unlikely that a man in Nana's position would be able to negotiate with Baloba Narayan Vagh on his own account

and without being introduced and assisted by some responsible person. Baloba Narayan Vagh, according to the evidence of one of his sons, was on friendly terms with Bhagwantrao and lived on Bhagwantrao's land. This is the person to whom Nana said in his evidence Bhagwantrao took him. Apart from the particular recital in the deed as to the interview with Nana's uncles about a year ago, the deed itself is material corroboration of the plaintiffs' case and was admissible in evidence.

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It appears that in 1912 Nana instituted a suit against Baloba Narayan Vagh and Bhagwantrao, treating the above mentioned sale deed as a mortgage, and alleging undue influence on the part of Bhagwantrao. He prayed for a declaration that the deed was a mortgage and that joint possession of the property should be granted. In his written statement delivered in October, 1912, Bhagwantrao denied that Nana was entitled to any share in the joint family property. This is the first occasion, of which there is any reliable evidence, when Bhagwantrao denied that Nana was entitled to a share in the family property.

There was no allegation at that time that Nana had been excluded from the joint family property in 1905 or 1906. That suit was withdrawn for a reason which it is not material to consider.

In 1914 another suit was filed by Nana against Baloba Narayan and Bhagwantrao, and again in his written statement Bhagwantrao denied that Nana was the son of Ramrao.

On August 13, 1919, Nana executed a further sale deed of his share in the property in favour of the first two plaintiffs. His claim that the previous sale deed was merely a mortgage was given up and he received a further sum of Rs.500, which, taken with the previous Rs.1500 and the interest thereon, was calculated to make up a total of Rs.3500.

The present suit was brought on July 21, 1920.

The issue in this appeal is whether the suit was barred by reason of art. 127 of the first Schedule of the Indian Limitation Act IX. of 1908.

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	<i>Description of Suit.</i>	<i>Period of limitation.</i>	<i>Time from which period begins to run.</i>
127.	By a person excluded from joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to plaintiff.

The questions arising upon the above mentioned article are: (1.) whether Nana was excluded from the joint family property; (2.) if he was so excluded when did such exclusion take place; (3.) when did the exclusion, if any, become known to Nana.

As regards the first and second questions, it was argued on behalf of the contesting defendants that it should be held that Nana was excluded from the joint family property from the year 1898, when he went to live with his maternal uncle after his mother's death, and reliance was particularly placed upon the facts that after that date Nana never resided in the family dwelling-house, he received no maintenance or education from the members of the joint family, who did not provide anything towards the expenses of his marriage, and that for many years he did not exercise his right to partition.

The above mentioned facts are certainly material for consideration, but in their Lordships' opinion they are not conclusive on the question of exclusion of Nana from the joint family property.

There is no definition of the word "exclusion" in the Limitation Act, and it is obvious that the question whether a person has been excluded from joint family property, must depend upon the facts of the particular case which is under consideration. It was admitted in argument by the learned counsel for the defendants that an intention to exclude is an essential element. Their Lordships are of opinion that the above mentioned admission is correct, and that it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude Nana.

Their Lordships are of opinion that there was no evidence which would justify them in holding that Nana was excluded from the joint family property in 1898.

The evidence goes to show that the departure of Nana from the family dwelling-house in 1898 with his maternal uncle was voluntary. He was in no sense turned out. He went with the consent of Bhagwantrao. The reason for his departure is obvious: his father and mother were dead, he was only twelve years old, and, as the learned Subordinate Judge point out, Rakhmabai ruled that branch of the family, and having regard to the state of affairs under that rule and to what had previously occurred, it may well have been thought better for Nana that he should go with his maternal uncle rather than remain in the same house with Rakhmabai.

It remains to be seen whether there is evidence of his exclusion from the joint family property after that date.

As he grew up he helped his maternal uncle in his agriculture and then was able to get some land for himself from the Government. It is true that he was living in a humble way, and was not educated in the same way as the other members of the joint family who were living at Bhamburda, but there is nothing to show that he was dissatisfied with the conditions under which he was living. One reason given for his not visiting Bhamburda was that he did not go on account of the quarrelsome nature of his stepmother Rakhmabai.

His marriage expenses were practically nil, as his marriage took place at the same time as that of his maternal uncle's brother.

The mere fact that during the time that Nana was living with his maternal uncle the members of the joint family did not subscribe towards his maintenance, education or marriage expenses does not, in their Lordships' opinion, having regard to the facts of this case, prove that those in control and possession of the joint family property intended to exclude him from his share of the joint family property. It is consistent with the evidence that the members of the joint family, who were in control and possession of the joint property,

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J.C. though willing to allow Nana to be maintained at the expense
 1929 of his maternal uncle, never did anything to indicate to Nana
 — RADHOBA or any one else that they intended to exclude him from his
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It is not necessary to refer in detail again to the facts of the case: it is sufficient for their Lordships to say that up to the time when Nana attained his majority in 1904 they are consistent with there having been no intent to exclude Nana from the joint family property and no exclusion in fact.

In 1904 Nana attained his majority. Their Lordships cannot find any reliable evidence that there was any change in the position until 1909.

The defendants' attempt to prove a demand by Nana in 1905 or 1906 and a refusal by his paternal uncles entirely failed. It is material to notice that Ababa, the maternal uncle of Nana, was not asked in cross-examination if he had told Nana that he was entitled to a share in the joint family property, had drawn his attention to the advisability of claiming his share: a question which their Lordships would have expected might usefully have been put to Abba. In short, with the exception of the alleged demand in 1905 or 1906 (the proof of which failed), their Lordships' attention was not drawn to any act or acts during the period from 1904 to 1909 which would indicate an exclusion of Nana from his right to share in the joint family property.

Their Lordships have no doubt that in or about 1909 Nana did go to Bhamburda and did assert his right to a share in the joint family property.

It was argued on behalf of the defendant-respondents that the recital in the deed of June 6, 1910—namely, "that they refused to give (my) share," was inconsistent with Nana's evidence. Their Lordships do not take that view, and are of opinion that the said recital, when read with the other terms of the deed, in which it was alleged that Nana had asked his uncles and his stepbrothers to effect a partition and to allot to him a one-ninth share, so far from being inconsistent with Nana's evidence, may be said to be corroborative thereof.

If Nana's evidence is accepted in toto, there was not, even in 1909, any denial by Bhagwantrao of Nana's right to a share, but merely a refusal to partition the property at that time, and their Lordships are of opinion that the sale deed of 1910 does provide material corroboration of Nana's evidence that up to that time there was no exclusion of Nana from the joint family property.

Even if it be taken that the refusal on the part of Bhagwantrao in 1909 or 1910 to agree to a partition was based on an allegation that Nana was not entitled to share in the joint family property, and that it did amount to an exclusion of Nana from such property, the suit was brought within twelve years and was in time.

The conclusion of their Lordships on this part of the case is that the evidence is consistent with there having been no exclusion of Nana from the joint family property before 1912, and that being so, the defendants have not discharged the onus of proving the exclusion on which they relied.

In view of this opinion, it is not necessary to consider the third question above mentioned. Their Lordships, however, desire to observe that, with regard to the third question, even assuming that the facts relied upon by the defendants could be said to amount to exclusion, the defendants have failed to prove that Nana was aware more than twelve years before the institution of the suit of any intention on the part of the members of the joint family to exclude him from the joint family property when he should choose to assert his rights.

In considering the whole case, it is not immaterial to remember that the main defence of the contesting defendants was that Nana was not a member of their joint family, that the further case made was that he was definitely refused a share in 1905 or 1906, and that both these allegations have been held to be unfounded.

For these reasons their Lordships are of opinion that this appeal should be allowed, that the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored.

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J. C. The respondents 1 to 5 should pay the costs of the plaintiffs of this appeal and of the appeal to the High Court, and their Lordships will humbly advise His Majesty accordingly.

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Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

J. C.* ABDUL JALIL KHAN AND OTHERS } APPELLANTS;
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June 17. OBAID ULLAH KHAN AND OTHERS } RESPONDENTS.
(DEFENDANTS)

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

Sale in Execution—Benami Purchase—Real Purchaser obtaining Title by adverse Possession—Dispossession by Transferee from Benamidar—Code of Civil Procedure (Act V. of 1908), s. 66—Indian Limitation Act (IX. of 1908), s. 28, Sch. I., art. 144.

If after an auction sale of immovable property in execution of a decree the real purchaser has for twelve years possession adverse to the certified purchaser, his benamidar, and is then dispossessed by a transferee of the certified purchaser, he can sue for possession on the title acquired by him under the Indian Limitation Act, 1908, s. 28, and Sch. I., art. 144, and need not aver or prove that the auction purchase was made for him; s. 66 of the Code of Civil Procedure, 1908, therefore, does not apply in that case.

It was unnecessary to decide whether the High Court had rightly held that in the case of a sale and transfer before 1909, s. 66 of the Code of 1908, and not s. 317 of the Code of 1882, applied.

Decree of the High Court I. L. R. 43 A. 416 varied.

APPEAL (No. 82 of 1924) from a decree of the High Court (January 15, 1920), which affirmed, so far as is material to the subject-matter of this report, a decree of the Additional Subordinate Judge of Aligarh.

The suit related to immovable properties which, having been sold in execution of decrees, were transferred in 1900 by the certified purchasers to the first respondent Obaid Ullah. Both Courts in India found that Abdul Shakur and

* Present: LORD BLANESBURGH, LORD DARLING, LORD TOMLIN, SIR JOHN WALLIS, and SIR GEORGE LOWNDES.

Abdul Latif, whose heirs were the appellants, were the true purchasers, and that they and the appellants after them had been in physical possession from shortly after the sales until 1915. In 1909 Abdul Ghafur had executed a deed of wakfnama of all his property, including his share of properties bought at the sales.

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The suit was brought by the appellants on August 5, 1916. They prayed by their plaint for a declaration that they were owners in possession of the properties; alternatively, if it were found that the first respondent was in possession, for an order for possession; they alleged that they were the true purchasers, also that any right or title which the first respondent had was extinguished by adverse possession. They also alleged that the wakfnama, of which Obaid Ullah had been appointed mutawalli, was inoperative.

The material facts appear from the judgment of the Judicial Committee.

The Subordinate Judge held that so far as the suit related to properties transferred by the certified purchasers it was barred by s. 66 of the Code of Civil Procedure, but that the wakfnama had never been brought into operation, and that the plaintiffs were entitled to recover the properties included in it, except those purchased at the auction sale. He decreed accordingly.

On an appeal and cross-objection the High Court dismissed the suit altogether. The learned judges (Mears C.J. and Knox J.) affirmed the view that so far as the suit related to properties transferred by the certified purchaser it was barred by s. 66 of the Code of 1908; they rejected a contention that s. 317 of the Code of 1882 and not s. 66 of 1908 applied. With regard to the wakfnama they held that the intention having been to create a genuine dedication, the subsequent conduct of Obaid Ullah did not invalidate it. The judgment is reported at I. L. R. 43 A. 416.

1929. April 16, 18. *Dunne K.C.* and *Wallach* for the appellants. The sale and transfer were both before 1909, consequently the Code of Civil Procedure, 1908, s. 66, did

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not apply, as it is not retrospective in effect: *Promatha Nath Pal Chowdhuri v. Mohini Pal Chowdhuri*. (1) Sect. 317 of the Act of 1882, which was in operation, did not in terms apply to a suit against transferee from a certified purchaser. The High Court at Allahabad in *Sibta Kunwar v. Bhagoli Joardar* (2) rightly held that s. 317 did not so apply by implication; the High Courts at Calcutta and Madras also have so held, though in Bombay it was held to the contrary. Sect. 66 should not be given a retrospective effect, which takes away a right of action existing when it was passed; that is so even if the section deals with a matter of procedure: *Colonial Sugar Refining Co v. Irving*. (3) Further, the plaintiffs pleaded alternatively that they had a title by adverse possession, and it was concurrently found that they were in possession from the date of the sale until 1915. They therefore had a title under the Indian Limitation Act, s. 28, and Sch. I., art. 144, and an alternative cause of action to which s. 66 of the Code did not apply.

De Gruyther K. C. and *E. B. Raikes* for the first respondent. There is no ground for holding that s. 63 of the Code of 1908 does not apply to every suit brought after that code came into force by a person claiming to have purchased benami. Even if the Code of 1882 applied, the High Court at Bombay rightly held in *Hari Govind v. Ramchandra* (4) that s. 317 applied to a suit against a transferee from a certified purchaser. The title by limitation was not put forward in the High Court, nor in the appellants' reasons upon the present appeal. There was no finding that the plaintiffs' possession was adverse; it may equally have been by the consent of the certified purchaser.

Dunne K. C. replied.

June 17. The judgment of their Lordships was delivered by SIR JOHN WALLIS. The parties to this suit are members of a Mahomedan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif

(1) (1920) I. L. R. 47 C. 1108.

(2) (1899) I. L. R. 21 A. 196.

(3) [1905] A. C. 369.

(4) (1906) I. L. R. 31 B. 61.

to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid Ullah, the first defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid Ullah is the son of a younger brother. The second and third defendants are widows, who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain properties in the aforesaid villages, which were purchased at court auctions in execution of decrees by Mahmud Ali on April 20, 1885, and by Sirajul Haq on March 21, 1892. On July 7 and 8, 1900, Sirajul Haq and Mahmud Ali executed sale deeds of these properties in favour of Obaid Ullah, the first defendant.

The plaintiff's case is that the purchases at the court auctions and the subsequent transfers were made benami for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death had executed a wakfnama of all his properties, but it was alleged that this wakfnama was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the first defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardized the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the first defendant. The plaint was

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subsequently amended by including a prayer for possession in case the Court should be of opinion that the plaintiffs were not in possession.

The first defendant pleaded that as regards the properties purchased at court auctions in the name of Sirajul Haq and Mahmud Ali, the suit was barred by s. 66 of the Civil Procedure Code of 1908. He denied that the auction purchase was benami, and alleged that he and his transferors had all along been in possession. As regards the wakf created by Abdul Latif, the first defendant admitted the execution of the deed of wakf, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed mutawalli or trustee of the wakf, but he alleged that he was then unaware that the wakf deed included properties of his own which had been purchased by Sirajul Haq and Mahmud Ali at the court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the wakf unless the deed of wakf was cancelled. The second and third defendants filed written statements in which they challenged the validity of the wakf and prayed that their interest as heirs of Abdul Latif should be protected.

The issues material to this appeal were as follows : (3.) Whether the plaintiffs are in possession ? (4.) Whether the claim is time barred ? (5.) Whether the plaintiffs by adverse possession extending over twelve years have become the proprietors of the properties in suit ? (6.) Whether s. 66 of the Civil Procedure Code bars the suit ? (7.) Whether purchases and acquisitions made by Sirajul Haq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan ? (8.) Whether the sales in favour of the Defendant No. 1 were fictitious and the transactions were benami for Abdul Latif and Abdul Shakur ? (11.) Whether the wakfnama executed by Abdul Latif was a genuine transaction or was it only a nominal one ?

As regards issues (3.) and (4.) the Subordinate Judge, whose findings of fact were accepted by the High Court, found that plaintiffs were not in possession at the date of suit, but that

they and those through whom they claimed had been in possession, "physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur, and that the sales by Sirajul Haq and Mahmud Ali to the first defendant were also benami for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases, he held the suit was barred by s. 66 of the Civil Procedure Code.

As regards the fifth issue the Subordinate Judge disposed of it by observing "the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession. The finding of the Court being that in respect of the bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

The Subordinate Judge also held that the wakf created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder, as the first defendant had taken possession of the wakf properties not as a duly appointed mutawalli, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased benami at the court auctions, and directed that as regards any questions arising between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the first defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the wakf created by Abdul Latif, as the gift of those properties to the wakf had been duly perfected by Abdul Latif in accordance with the requirements of

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Mahomedan law, and as, after his death, the first defendant had been duly appointed mutawalli of the wakf.

They therefore dismissed the plaintiffs' appeal and allowed the first defendant's cross-objections as to the wakf properties.

As regards the properties which, according to the findings, were purchased at court auctions by Sirajul Haq and Mahmud Ali benami for Abdul Shakur and Abdul Latif, and were subsequently transferred to the first defendant, Obaid Ullah benami for them, both the lower Courts were of opinion that the suit was barred under s. 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a "person claiming title under a purchase certified by the Court . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims." The present section says that "no suit shall be maintained against any person claiming title under a purchase certified by the Court," whereas the wording of the corresponding s. 317 of the Code of 1882 was "no suit shall be maintained against the certified purchaser," and the alteration was admittedly made because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of s. 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from benamidars made when s. 317 of the Code of 1882 was in force, and it has been contended before their Lordships on the authority of that decision that the lower Courts were wrong in applying the provisions of s. 66 of the Code of 1908 to the present case.

Their Lordships do not propose to deal with this question, because in their opinion, assuming the Courts to have been right in holding that the case must be dealt with under the provisions of s. 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative

cause of action, which is the subject of the fifth issue—namely, their dispossession by the first defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

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In dealing with these questions their Lordships think it desirable in the first place to refer to *Buhuns Kowur v. Behoree Lall* (1), a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to make these *bénami* transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lokhee Narain Roy Chowdhry v. Kalypuddo Bandopadhyaya* (2) it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by the section from showing the real nature of the transaction.

Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser, "being the true owner," to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section. In such a case, if the true owner has been in possession for less than twelve years, he will no

(1) (1872) 14 Moo.I.A. 496.

(2) (1875) L.R. 2 I.A. 154.

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doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question, as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossessing, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of S. 66 of the Code of Civil Procedure, 1908, and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, benami.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the wakf created by Abdul Latif in 1909. It has been found by both Courts that the gift to the wakf was duly perfected according to the rules of Mahomedan law and by the High Court that the first defendant was duly appointed mutawalli or trustee of the wakf after the founder's death, and the plaintiffs' claim to the wakf properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the lower Courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not included in the wakf, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the Courts below and here, and they will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

SHIB CHANDRA AND ANOTHER } APPELLANTS;
 (DEFENDANTS) }
 AND
 LACHMI NARAIN AND OTHERS } RESPONDENTS.
 (PLAINTIFFS) }

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[AND CONNECTED APPEAL.]

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mortgage-Redemption-Provision for Redemption of Properties separately—Deficiency in Sum advanced—Proportionate Reduction on separate Redemption—Redemption by Purchaser—Lis Pendens—Revenue paid by Mortgagees—Transfer of Property Act (IV. of 1882), ss. 52, 83.

Several properties were mortgaged together in 1905, the consideration being stated to be an advance of Rs.35,000; the mortgagors agreed to pay a fixed annual sum as interest and the Government revenue. By the deed the properties could be redeemed separately on payment of a sum specified for each, provided that all interest on the whole mortgage had been paid or tendered. The sum actually advanced was only Rs.30,984. In 1910 the mortgagees obtained a decree for interest, and in 1912, while an appeal by the mortgagees was pending, the mortgagors sold two of the properties. On appeal the decreed amount was increased by adding interest pending the suit. The purchasers deposited money in Court under the Transfer of Property Act, 1882, s. 83, with a view to redemption of the purchased properties. Upon an issue whether the deposit was sufficient:—

Held, (1.) that, both on general principles and under s. 52 of the Transfer of Property Act, the purchasers were liable in respect of the increase in the amount for interest decreed on appeal.

(2.) That though the sums specified as payable on redemption of the separate properties, and the annual sum fixed for interest, could properly be reduced in proportion to the deficiency in the sum advanced; Government revenue paid by the mortgagees could not be so reduced, as they were entitled to deduct it (with interest thereon) from any interest received by them, and to credit in account only the balance.

(3.) That consequently the deposit was insufficient.

Decree of the High Court reversed.

CONSOLIDATED APPEALS (Nos. 126 and 127 of 1926) from two decrees of the High Court (December 11, 1923) reversing two decrees of the Subordinate Judge, Moradabad.

The two suits giving rise to the appeals were brought by the respondents to redeem two separate properties which

*Present: LORD BLANESBURGH, LORD TOMLIN, and SIR BINOD MITTER.

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with other properties were the subject of a mortgage dated March 25, 1905. The plaintiffs-respondents had purchased the properties in suit in 1912 from the mortgagors. The issue arising was whether a deposit made by the plaintiffs under the Transfer of Property Act, 1882, s. 83, was sufficient.

The trial judge held that the deposit was sufficient, but the High Court reversed that decision.

The facts appear from the judgment of the Judicial Committee.

1929. May 13, 14. *Dunne K.C.* and *Dube* for the appellants.

De Gruyther K.C. and *Parikh* for the respondents.

June 21. The judgment of their Lordships was delivered by SIR BINOD MITTER. These are two consolidated appeals against two decrees dated December 11, 1923, of the High Court of Judicature at Allahabad, setting aside two decrees dated January 18, 1921, of the Court of the Subordinate Judge, Moradabad.

The two suits in which the decrees of the High Court were passed were brought by the plaintiffs-respondents separately against the appellants to redeem two items of properties covered by a mortgage dated March 23, 1905—namely, 13 biswas of the village Sadat Bari and the whole village Rudain, respectively, and the question for determination now is whether the deposit made by the plaintiffs under s. 83 of the Transfer of Property Act on June 29, 1912, was sufficient.

On March 23, 1905, the original mortgagors executed a mortgage deed in favour of the appellant Shib Chandra and another who, on the same day executed a lease in favour of the mortgagors in respect of the mortgaged premises and under that lease the mortgagors agreed to pay Rs.2325 in two instalments per annum (which also was agreed amount of interest under the mortgage deed), together with the sum of Rs.1526 as Government revenue on the properties. It was agreed that if there was any deficiency in the payment of

interest or lease money then the amount should carry compound interest at the rate of 1 Re. per cent. per mensem. It was provided by the mortgage deed that each property could be separately redeemed in the month of June of any year on payment of the amount entered against it in the deed provided always that the interest on the whole mortgage money had been paid or tendered at the time of such redemption. The consideration stated in the mortgage deed was Rs.35,000. The only sum the mortgagors ever repaid was Rs.1000 in January, 1907.

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On January 14, 1910, the mortgagees brought a suit in the Court of the Subordinate Judge of Moradabad (hereinafter referred to as the original suit) against the mortgagors for recovery of Rs.12,327-5, being the interest or lease money up to June, 1909, together with compound interest at 12 per cent. per annum as provided for in the mortgage deed and in the lease. The mortgagees further claimed interest pendente lite and interest up to realization, and they also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The mortgagors contended that the whole of the Rs.35,000 mentioned in the mortgage deed had not been advanced, but that a sum of Rs.30,984 was only advanced and that the interest payable on the mortgage or the lease money should be proportionately reduced.

On February 23, 1912, the Subordinate Judge decided that the sum actually advanced was Rs.30,984, and that, therefore, the amount of annual interest or lease money was Rs.2058-3-6 and not Rs.2325, as stated in the mortgage deed and the lease. He accordingly passed a decree for Rs.10,720-10-4 and interest thereon at the rate of 6 per cent. per annum until realization with costs amounting to Rs.1770-2-8. He also gave the mortgagees a decree for sale under Order xxxiv., r. 4, of the Code of Civil Procedure, 1908, in default of the payment of the decretal amount on or before August 22, 1912, and he further decreed that Rs.12,812-7-3 would be due on that date. He further decreed possession of the

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mortgaged properties to the mortgagees, and they, on April 3, 1912, obtained symbolical but not actual possession.

It appears that the Subordinate Judge did not allow any interest during the pendency of the original suit and the mortgagees (that is the present appellants) appealed against the decree of the Subordinate Judge to the High Court of Judicature at Allahabad and the High Court, on January 27, 1914, varied the decree of the Subordinate Judge by allowing interest during the pendency of the suit to the extent of Rs.2706-2, and they allowed the costs of the appeal, which were fixed at Rs.416-12-6. The decree of the Subordinate Judge was therefore increased by Rs. 3122-14-6.

While the appeal of the mortgagees was pending the mortgagors on April 12, 1912, sold and conveyed their equity of redemption in mauza Sadat Bari to Pandit Bihari Lal (the predecessor-in-interest of the present plaintiffs in the first suit—that is suit No. 333 of 1919), and they also on June 22, 1912, sold and conveyed their equity of redemption in mauza Rudain to Rameshwar Sahai and Bhola Nath (the latter being the predecessors-in-interest of respondents two and three in suit No. 371 of 1919).

In the mortgage deed in suit the sum of Rs.13,000 was entered as the principal amount against Village Rudain, and the sum of Rs.5000 was entered as the principal against Sadat Bari. Bihari Lal, the purchaser of Sadat Bari, also purchased certain other items of property, i.e., a grove consisting of some land in Majahidpur Sarai and certain houses and shops, and the sum of Rs.4000 was entered against them as the principal. This last mentioned property is not the subject-matter of the suits for redemption.

The conveyance of April 12, 1912, mentioned that the sum of Rs.32,000 was left with the purchaser for payment of the miscellaneous debts due under decrees and mortgage money and other debts, etc., payable by the vendors, and it was agreed that the vendors should cause to be paid by the purchaser under their supervision the sum of Rs.32,000 to the creditors of the vendors. By the deed of June 27, 1912,

the sum of Rs.13,000 was left with the purchasers of Village Rudain for payment to the mortgagee.

On June 29, 1912, a sum of Rs.41,837-5-6 was deposited in Court by the purchasers under s. 83 of the Transfer of Property Act, and the respondents allege that on this deposit being made they were entitled to call upon the mortgagees to reconvey the properties which they had purchased.

The question is whether this sum was sufficient. The sum of Rs.41,837-5-6 was made up of the following items:—

- (a) Rs.16,120-14-6 for principal allocated for redemption of all the properties purchased by Bihari and interest on the entire mortgage from January, 1910, to June, 1912.
- (b) Rs. 4716-7-0 paid by Bihari towards satisfaction of the decree in part of the original suit.
- (c) Rs. 13,000-0-0 paid by Rameshwar Sahai.
- (d) Rs. 8000-0-0 paid by Rameshwar Sahai towards the decree in the original suit.

Rs.41,837-5-6

The Subordinate Judge in his judgment has held that the sum that the purchasers ought to have deposited was Rs.45,935-13-3. He held that although the judgment of the High Court was not delivered till January, 1914, still on the date of the tender that sum which the High Court allowed in addition to what the Subordinate Judge in the original suit had awarded was in fact due on June 29, 1912. He also held that although the principal sum of Rs.35,000 had been held not to have been paid, but that only Rs.30,984 had been advanced on the mortgage, still there should be no proportionate reduction of the sums fixed for the redemption of each item of property as entered in the mortgage deed against that property. He further held that the costs of the appeal to the High Court as also the land revenue that had been paid to the Government by the mortgagees with interest thereon should be taken into account. In his view Rs.45,935-13-3 was the sum that the purchasers had to pay before they could

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redeem the properties purchased by them. Accordingly he held that the tender fell short by Rs.4098-7-9. On appeal, however, the High Court held that the sufficiency of the amount of deposit should be judged by the state of things on June 29, 1912, irrespective of the result of the appeal and they further held that as only Rs.30,984 was advanced instead of Rs.35,000, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of the mortgage, and that by adopting this method the principal sum payable by the purchasers would be Rs.19,472-12-11 instead of Rs.22,000.

Their Lordships are of opinion that the view of the High Court on this last mentioned point is correct, and in fact Mr. Dunne, for the appellants, did not seriously contest it. Their Lordships are, however, of opinion that the purchasers were bound by the decision of the High Court whereby that Court increased the amount awarded by the Subordinate Judge in the original suit by Rs.3179. The purchasers can have no higher rights than their vendors, and it appears to their Lordships also that the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, the purchasers must be bound by the result of the litigation: see s. 52, Transfer of Property Act, and *Faiyaz Husain Khan v. Prag Narain*. (1)

Their Lordships are further of opinion that Rs.926-9-10 were due to the mortgagees, for Government revenue and interest thereon, both by the terms of the mortgage deed and the lease as also by the general law of mortgage in India.

The High Court in its judgment has held that the whole of this sum should not be added for the purpose of testing the sufficiency of the tender, but that it should be equitably distributed as against the purchasers in the same way as the principal amount of Rs.22,000 is to be distributed. Even if this view were taken, the amount would work out at about Rs.614, which would make no difference in the result.

Their Lordships, however, think that this view of the High Court is not correct. It is quite clear that the mortgagees

by paying the Government revenue are entitled to add the same for the purpose of ascertaining their total dues under their mortgage: see *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee*. (1) In the present case under the mortgage deed Government revenue has to be deducted in the first instance from the entire income, therefore, it should be deducted before any credit for interest is given at all, and when the tender of interest was made on June 29, 1912, the mortgagees were entitled to deduct the Government revenue paid by them and interest thereon from the interest which had been paid by the mortgagors and only credit the balance to the interest account, and as the purchasers had to pay the entire interest before they could call for redemption, this suggestion of the High Court seems to their Lordships to be wrong.

Mr. De Gruyther contended that as the purchasers deposited all instalments of interest from January, 1910, to June, 1912, and added thereto the interest on the same they had thereby in fact paid the full interest during the pendency of the original suit—namely, from June, 1909, to February, 1912.

The Subordinate Judge, in the original suit, had decreed interest up to June, 1909, and fixed the same at Rs.10,720-10-4, therefore, on June 1, 1910, the interest that must be calculated would be not only interest on the instalment from June, 1909, to June, 1910, but upon the decreed amount of Rs.10,720-10-4, plus the instalment that fell due between June, 1909, and June, 1910, as the mortgage deed provided for compound interest. The argument of Mr. De Gruyther, therefore, seems more specious than sound. If calculation is made on this basis even then the deposit is insufficient.

Deducting, however, from the said sum of Rs.45,935-13-3 (which the Subordinate Judge held due in June, 1912), the sum of Rs.2527-3-1, which represents the difference between the said principal sum of Rs.22,000 and Rs.19,472-12-11 which the High Court rightly held to be the principal sum payable by the purchasers, the deposit should have been for Rs.43,405-10-2. The result, therefore, is that the deposit was insufficient and interest did not cease to run from

(1) (1867) 11 Moo.I.A. 241, 258.

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J. C. June 29, 1912, and their Lordships accordingly hold that the decrees of the High Court should be set aside and the cases remitted for the ascertainment of the sum which is due to the mortgagees from the mortgagors and they are of opinion that a decree for redemption under Order xxxiv., r. 7, should be passed on the aforesaid basis.

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The contesting respondents will pay to the appellants the costs of these appeals, as also their costs in the Courts below. The mortgagees will also be at liberty to add their costs to their claim. The mortgagors, if they have incurred any costs, will bear the same.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H.S.L. Polak.*

Solicitors for respondents: *Douglas Grant & Dold.*

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 1929 (SINCE STRUCK OUT) AND ANOTHER } APPELLANTS;
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 AND
 YELAMANCHILI PITCHAYYA AND }
 OTHERS (DEFENDENTS) } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Madras Tenancy-Lease before Act-Reservation of Trees-Effect and Duration of Reservation-Dry Pasturage Waste-Covenant to pay increased Rent on Cultivation-Right to Inclusion in Puttah-Estates Land Act (I. of 1908, Mad.), s. 3, sub-s. 16; s. 12.

Where land subject to the Madras Estates Land Act, 1908, was leased before the Act to a ryot who executed a contract by which all rights in trees on the land were reserved to the landholder, the effect of s. 12 of the Act is that the reservation continues as to trees on the land at the passing of the Act during the occupancy rendered permanent by the Act, not merely during the term of the lease; the ryot has the right to use, enjoy, and cut down only trees which after the passing of the Act are planted by him or grow naturally.

There is no provision in the Act enabling a landholder to claim an enhancement of rent or any additional payment for trees the right to which he has lost by the operation of the Act.

*Present: LORD BLANESBURGH, LORD TOMLIN, and SIR BINOD MITTER.

Where a lease to a ryot before the Act describes part of the land leased as "dry pasture waste" but provides that if any part of it is cultivated the rent thereon shall be increased to that provided for "cultivation" land, there is not thereby a reservation of that part as pasturage, and, subject to the exceptions in s. 3, sub-s. 16, it is ryoti land which the ryot is entitled to have included in his puttah, even though it has never been cultivated.

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Yarlagada Mallikarjuna v. Subbiah (1920) 39 Mad. L. J. 277 distinguished.

Censure of dilatory proceedings and useless costs.

Decree of the High Court reversed as to the effect of s. 12.

APPEAL (No. 115 of 1924) from a decree of the High Court (October 28, 1919) varying a decree of the District Court of Kistna at Masulipatam which affirmed a decree of the Court of the Suits Deputy Collector.

The suit was brought by the father of the appellants against defendants now represented by the respondents for a decree directing the defendants to accept a puttah tendered to them by the appellants under the Madras Settled Estates Act, 1908, and to execute a corresponding muchalka.

The questions arising were: (1.) As to the effect of s. 12 of the Act where a ryot had contracted before the Act that all rights in trees on his holding should belong to the land-holder; (2.) Whether 297 acres included in a lease before the Act were ryoti land within s. 3, sub-s. 16, and s. 6 of the Act.

On the first question the High Court (Seshagiri Ayyar and Napier JJ.), reversing the District Judge, held that the reservation did not operate beyond the term of the lease.

The facts and the terms of s. 12 of the Act appear from the judgment of the Judicial Committee.

1929. May 10, 13. *P.V. Subba Row* for appellant No. 2.

Dunne K.C. and *Narasimham* for the respondents.

July 1. The judgment of their Lordships was delivered by LORD BLANESBURGH. There are two questions raised by this appeal: they both lie within the narrowest compass; the second of them barely survives to come before the Board, so complete has been judicial agreement upon it in India, while the determination of the first, which now alone is

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serious, depends upon the construction of a few words in a single section of a statute. Yet the plaint in the suit was issued as long ago as October 18, 1912, and it is nearly seventeen years thereafter that these short questions reach the Board for final determination, and, in the result will now be settled as they were settled by the Revenue Court in India nearly fifteen years ago. In the course of the proceedings not only has the plaintiff died, but one of his legal representatives, originally appellant, has dropped out, leaving it to the plaintiff's other representative, the second appellant, by himself to bring his case to a hearing. Not the least important of their Lordships' duties in disposing of the appeal has been the task of determining how the costs thrown away as the result of well-nigh interminable proceedings in India should now be borne.

The two appellants are the sons and legal representatives of the original plaintiff, the late Raja of North Vellore. On June 6, 1901, the Raja granted to one Ramayya Garu, father of the respondents, for a term of ten years, expiring Fasli, 1320, a lease of some 1363 acres of land in the village of Narayananapuram. Prior to this lease in his favour, Ramayya Garu had, as it is now agreed, no occupancy or other rights in the holding, which, but for the passing of the Madras Estates Land Act, 1908, would in ordinary course have reverted to the zamindar on the expiry of the lease.

Of the acres comprised in it some 843 were entered as being in cultivation, and 520 as being dry pasture waste. The annual rental for the whole was fixed at Rs.1784.13, representing, so far as the "cultivation" lands were concerned, a rent of Rs.0.14.2 per acre, and for the "dry pasture waste" a rent of 8 annas per acre. The lease, however, contained a provision, much relied upon by the appellant in support of his second ground of appeal, that if the lessee raised dry cultivation on the dry pasture waste he had to pay cist upon the land so cultivated at the higher rate of Rs.0.14.2 per acre as well as expenses.

The main, if not the only real, question now at issue between the parties is as to their respective rights in what

the District Judge, at one stage of the case, described as an immense belt upon the holding of paying trees—comprising at least 8000 palmyras and date palms fit for tapping, yielding a substantial revenue, and estimated by a succeeding District Judge to be of a capital value of roughly Rs.34,000. By the lease the Raja or zamindar reserved to himself full rights in regard to all these trees. The lessee was "not in the least to be entitled to them"; as the cist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the zamindar dealing with the same. And, as a matter of fact, these trees during the term continued to be let by the zamindar to other persons for tapping at rents yielding for him a substantial revenue. It was not contested before the Board that in these circumstances, the possession of and all rights over the trees remained during the pendency of the lease in the zamindar, and that no payment whatever in respect of them was included in the cess thereby reserved.

In that state of things and while the lease was still current, the Madras Estates Land Act, 1908, became law. This suit is concerned with the changes by the passing of that Act effected in the relations of the zamindar as lessor on the one hand, and the respondents, who by the death of their father had then become entitled to the lease, on the other, in respect of the subsequent property rights, first, in the trees—the important question—and next in the "dry pasture waste," now at all events a subordinate matter.

It will be convenient to call attention at once to the provisions of the statute relevant to the consideration of these two questions.

In the Act which came into force on July 1, 1908, an estate means amongst other things any permanently settled estate or temporarily settled zamindari: s. 3, sub-s. 2 (a); that is to say, it extends to the estate or zamindari of the Raja of North Vellore. "Holding" (s. 3, sub-s. 3) means a parcel or parcels of land held under a single puttah or engagement in a single village. In other words, the lands included in the lease of 1901 are by that term aptly described. "Ryoti,"

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land means cultivable land in an estate other than private land, but does not include (inter alia) tank beds: s. 3, sub-s. 16. "Ryot" means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it: s. 3, sub-s. 15. With these terms so defined s. 6 provides that, subject to the provisions of the Act, every ryot then in possession of ryoti land situate in the estate of a landholder shall have a permanent right of occupancy in his holding, while s. 9 enacts that no landholder shall as such be entitled to eject a ryot from his holding otherwise than in accordance with the provisions of the Act.

Sect. 12, upon which much turns, is textually as follows: "Subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder, every occupancy ryot shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding, he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

Sect. 24 provides that the rent of a ryot shall not be enhanced except as provided by the Act. Sect. 28: that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is proved. Sect. 30 enables a landlord to institute proceedings for enhancement of rent before the collector on certain stated grounds and no others. By s. 50, sub-s. 2, every ryot is entitled to call upon his landholder to grant him a puttah for any current revenue year, and every landholder is entitled to call upon his ryot to give him a muchalka in exchange. The proper contents of the puttah and muchalka are detailed in s. 51, and after provision made by s. 54 for the tender of a puttah by the landholder, s. 56 provides—and it is under this section that the present suit was instituted—that when a ryot for one month fails to accept the puttah tendered to him and to

give a muchalka in exchange, the landholder may sue before the collector to enforce acceptance of such puttah.

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As their Lordships have already observed, the lease of June 6, 1901, was still current when the Estates Act came into force. The effect of the statute, as will have been seen, was at once to give to the respondents a permanent right of occupancy in their holding so far as that consisted of ryoti land, and at once to supersede many of the provisions of the lease then current. Notwithstanding this, however, the parties until the expiry of the term apparently allowed their relations towards each other to be regulated by the lease, and it was not until after Fasli, 1320, that the Raja tendered to the respondents for the year 1912 a puttah in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the puttah tendered and to execute a proper muchalka this suit was, under s. 56 of the Act, brought by the Raja to enforce his statutory rights in these matters.

The refusal of the respondents to accept the tendered puttah was due to the fact that in their view its terms were, mainly in two respects, improper.

First, there were included in it the provisions of the lease already referred to, whereby the trees on the holding were reserved to the landholder, and the respondents objected that, by virtue of s. 12 of the Act, the puttah should have left with them the right to use, cut down and enjoy all trees in their holding. Secondly, there were excluded from the puttah the 520 acres of dry pasture waste which had been included in the lease. The respondents claimed that this acreage should remain part of their holding as being in fact cultivable and therefore ryoti land within the meaning of the Act.

It will be convenient to deal in their order with these two objections to the puttah, showing incidentally how each of them fared in the Courts in India.

First, as to the trees, the Deputy Collector in his judgment of August 17, 1914, in the Revenue Court expressed the opinion that, as the zamindar had reserved his right to them by written contract, he was entitled, under s. 12 of the Act, to

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continue to reserve the right by the suit puttah, limited, however, to the trees which existed before the Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing. The learned District Judge, on appeal on this point by the respondents, took the same view, and by decree of December 22, 1916, dismissed their appeal from the collector's judgment.

On further appeal, however, to the High Court at Madras, the learned judges there took a different view, which they expressed in a judgment of April 22, 1918. Under s. 12 of the Estates Land Act, the tenant, they said, was, subject to custom or written contract, entitled to the trees on payment of rent to the landholder, and in this case the reservation of the trees in the lease held good, but, in their opinion, only for the period of the lease. The reservation was no longer subsisting at the time of the tender of the puttah, and it ought not accordingly to have been retained therein. Other reasons given by one of the learned judges in support of the same conclusion have not been relied on before the Board, and need not be further alluded to.

In the result the learned judges of the High Court, thinking that the trees must be included in the holding, but that it was allowable under the Act to charge the respondents with a cist in respect thereof, directed an inquiry to ascertain the proper amount of such cist, and after prolonged and elaborate proceedings to that end, to which for the moment their Lordships do not further allude, the High Court, in a final judgment on October 28, 1919, fixed the amount payable by the respondents in this behalf at a single payment of 5 annas in respect of each tree, and in other respects gave effect to their judgment of April 22, 1918. And of all of this the appellant now complains.

The question turns, it will be seen, upon the meaning to be attached to the introductory words of s. 12 of the Act: "Subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder," and it may be conceded

that, as a matter of first impression, the view of these words taken by the High Court is attractive enough. There is, on the face of them, no obvious reason why the reservation should extend beyond the duration of the contract by which it is made. But this first impression disappears on a closer examination of the clause. The section is certainly dealing with a possession terminable when the Act came into force and converted into a permanent right of occupancy by s. 6. It is contemplating that as an incident of the terminable possession rights with respect to the trees on the holding might have been reserved to the landholder either by custom or by contract. It provides that where the reservation is by custom, it, so far as existing trees are concerned, is to remain effective throughout the whole of the occupancy, by the Act made permanent. So much it was conceded in argument was the effect of the section. But if reservation by custom was so long operative, why, so far as the section is concerned, should the result be different when the reservation had been made by contract? A reservation by custom is in this connection surely no more than this, that in places where the custom obtains such reservation is conventional without being expressly made, in contradistinction to places where no such custom exists—as, for example, in the zamindari of North Vellore, in which case the reservation, if it is to be operative, must be expressed as part of the contract.

But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of the right to possession by the tenant, the holding reverts to the zamindar. Accordingly, as might from this point of view be expected, the section makes no distinction in the result between a reservation made by custom and one made by contract, and in their Lordships' judgment, the true conclusion is, that where the reservation, however constituted, is conterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the ryots or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act.

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It would appear that the learned judges of the High Court came to the conclusion they did in this matter in the belief that it was open to them under the Act to charge the respondents with a suitable payment in respect of the trees which for the first time by virtue of the Act became theirs. At a later stage, however, the learned judges themselves were less confident of the correctness of this view, which is, as it seems to the Board, mistaken. Their Lordships can find no provision in the Act enabling the landholder to claim an enhancement of rent or any additional payment for his lost trees. Accordingly, if the view of this section taken by the High Court were correct, its effect in the present case must be altogether to deprive the landholder, without any kind of compensation provided, of property of great value, and its effect would be similar in many other cases. A construction of the section leading to such a result is not lightly to be entertained, and, in their Lordships' judgment, is not here called for. On this question, therefore, the Deputy Collector, supported by the learned District Judge, reached, in the view of the Board, the true conclusion.

The respondents' second objection to the puttah was the exclusion therefrom of the 520 acres, and this objection can be dealt with more briefly. Upon the evidence taken before him, the Deputy Collector on August 17, 1914, found that of the 520 acres in question, some 222 acres were tank-bed land, and that their exclusion from the puttah was, in consequence, justified under the Act. He held, however, in a most careful judgment, that the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated, and this view of the Deputy Collector, although, so far as it was against them, it has been contested by both parties throughout the Courts in India, has been upheld in all of them. Before the Board the respondents no longer contended that the tank-bed land should be included in the puttah, but the appellant, relying for his contention upon the case of *Yarlagada Mallikarjuna v. Subbiah* (1), still urged that the remaining 297 acres were given only

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for pasturage and not for cultivation, that, like the tank-bed lands, they should remain excluded from the puttah, the provision of the lease already referred to, which raised the rent per acre to Rs.0-14-2 on the extent cultivated, being meant to serve as a penal rent against the land being improperly used for cultivation purposes. Their Lordships cannot accept this argument. They prefer the explanation of the provision referred to, given by the Deputy Collector, which they give in his own words: "The reason why an alternative rate, i.e., a lower rate, was conceded in case of non-cultivation was apparently due to the facts that the land was waste before, that it would take some years before it could be reclaimed and brought under cultivation, and that it would be a hardship on the lessee if he were not allowed to pay a favourable rate till then. He was not, therefore, required to pay the full rate immediately."

In their Lordships' judgment accordingly this portion of the appellant's appeal entirely fails, and in the result the suit puttah as it was adjusted by the Deputy Collector on August 17, 1914, was rightly adjusted, and the subsequent attempts on both sides to have its terms varied have been misconceived.

In that state of things a very serious question arises as to the costs of these attempts. Their Lordships have considered this question very carefully, inquiring how far these costs have been occasioned by mistaken views contended for by one side or by the other. For the costs thrown away by the prolonged inquiries to ascertain the proper sum to be paid in respect of what may be called the suit trees, the respondents are mainly, if not entirely, responsible, for the costs thrown away in ascertaining what may again be described as the appellable value of the trees, they were in the view of the Board, entirely responsible. The increase again in the costs throughout by the appellants' mistaken contention as to the cultivable lands has been relatively slight. In the result their Lordships have reached the conclusion that, no interference being made with the order as to costs in the decree of the Revenue Court of August 17, 1914, or in that of the

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District Court of December 22, 1916, the justice of the case will be met if the respondents pay three-fourths of the subsequent costs incurred by those representing the original plaintiff or his estate, whether in the High Court, in the District Court, or on this appeal.

In the result accordingly their Lordships will humbly advise His Majesty that this appeal be allowed; that the order of the High Court of October 28, 1919, except in so far as it affirms the decree of the District Court of December 22, 1916, be discharged, and that the last mentioned decree be restored. The respondents must pay the costs already specified.

Solicitors for appellants: *Chapman-Walker & Shephard.*

Solicitor for respondents: *H. S. L. Polak.*

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RAJA PATESHWARI PARTAB NARAIN }
SINGH (SINCE DECEASED) (PLAINTIFF) } APPELLANT;
AND
SITA RAM AND OTHERS (DEFENDANTS) RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE CHIEF COURT OF OUDH.

Pre-emption—Waiver of Right to pre-empt—Offer to sell declined—Absence of Notice of intended Sale—“Village community”—Oudh Laws Act (XVIII. of 1876), ss. 7, 9, 10.

In 1872 the Government granted to a single grantee a large tract of waste land, which was later constituted a separate village. On the grantee's death the village passed to his devisees, who resided in England. Through their local agent they offered the village for sale, divided into blocks at fixed prices. The appellant having purchased a block and registered the conveyance claimed to pre-empt, under the Oudh Laws Act, 1876, s. 9, other blocks which had been purchased by the respondents severally under agreements completed at a later date. It appeared that the appellant knowing the fixed prices had definitely told the vendors' agent that he did not wish to buy any other block, and that he had

* Present: LORD BLAINESBURGH, LORD TOMLIN, LORD THANKERTON, SIR GEORGE LOWNDES, and SIR BENOD MITTER.

acquiesced in an oral agreement already made for the sale of some of the blocks to one of the respondents:—

Held, that if the appellant had a right to pre-empt he had waived it by his conduct, even though no formal notice of an intention to sell was given to him under s. 10 of the Act.

Bhagwat Singh v. Saiyad Nazir Husain (1902) 5 Oudh Cases, 395, followed in later Oudh decisions, approved.

Quaere (1.) whether the devisees of the grantee constituted a "village community" within the meaning of the Oudh Laws Act, 1876, s. 7; (2.) whether a registered conveyance entitles a purchaser to pre-empt land the subject of a sale already completed, but unregistered.

Decree of the Chief Court affirmed.

CONSOLIDATED APPEALS (Nos. 29, 30, 31 of 1928) from three decrees of the Chief Court of Oudh (November 20, 1928) affirming two decrees and reversing one decree of the Subordinate Judge of Gonda.

A village in Oudh, called Cookenagar, was divided into blocks by its proprietors and the blocks offered for sale at fixed prices. The appellant acquired one block by a sale deed executed and registered on June 9, 1924. He brought three suits against the respondents, claiming that under the Oudh Laws Act, 1876, s. 9, he had the right to pre-empt other blocks which had been purchased by the respondents respectively; he pleaded that he had not been given notice of the sales as required by s. 10 of the Act.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed two of the suits on the ground that the sales to the defendants therein were made before June 9, 1924, the date when the sale to the plaintiff was completed and registered, and that consequently the plaintiff was not entitled to notice of them; he decreed the third suit, finding that the sale there was after that date.

Upon appeals to the High Court it was held that the suits could not be maintained, as there was no right of pre-emption in the village. The learned judges (Stuart C.J. and Mohammad Raza J.) were of opinion that no custom of pre-emption was proved to exist in the village, and that the presumption enacted in s. 7 of the Act being conditional upon there being a village community did not arise, since in their view there

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was no village community in Cookenagar, either in 1876 or in 1924.

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1929. June 4, 6, 7. *Dunne K.C.* and *Jopling* for the appellant. By s. 7 of the Act a custom of pre-emption is to be presumed to exist in the village. The appellant had a right to pre-empt under s. 9 of the Act, both as a co-sharer in the mahal and as a member of the village community, and he was entitled to notice of the sales under s. 10. It is not material that there were agreements to sell before the registration of the sale to the appellant, as by s. 54 of the Transfer of Property Act a contract of sale creates no interest in the land. The expression "village community" in s. 7 is not used in any technical sense; where there are a number of co-sharers there is a village community: *Rahim-ud-din v. Rewal* (1); *Munnu Lal v. Muhammad Ismail*. (2) It is not material that some or all of the co-sharers resided out of India.

De Gruyther K.C. and *Parikh* for the respondents in appeals Nos. 29 and 30; *Dube* for respondent in appeal No. 31. There was no proof of a custom of pre-emption in Cookenagar, and the village was not a "village community" so as to raise a presumption of the existence of the custom under s. 7 of the Act: *Drigbijai v. Court of Wards* (3); *Narindra Bahadur Singh v. Balkaran Singh* (4); *Ram Dayal v. Chaudhri Mohammad Abdul Basit* (5). *Rahim-ud-din v. Rewal* (1) applied to pre-emption in the Punjab, where the tenures and the relevant legislation are different from those in Oudh. Even if a custom of pre-emption is to be presumed under s. 7 the presumption is rebutted, as in the circumstances no custom of pre-emption could have arisen. But even if the plaintiff had a right to pre-empt he waived that right, as he definitely declined to purchase more than the one block. [Reference was made to the cases in Oudh referred to in their Lordships' judgment.]

Dunne K.C. in reply. By s. 6 the plaintiff had a right to acquire "in preference to all other persons," that includes

(1) (1903) L. R. 30 I. A. 39.

(3) (1901) 5 Oudh Cases, 266.

(2) (1904) L. R. 31 I. A. 212.

(4) (1904) 7 Oudh Cases, 275.

(5) (1908) 12 Oudh Cases, 1.

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persons who have by contract a right to call for a conveyance. The evidence did not establish any waiver by the plaintiff of his rights.

July 5. The judgment of their Lordships was delivered by SIR GEORGE LOWNDES. These three consolidated appeals raise a somewhat unusual question under the law of pre-emption in Oudh.

The facts are as follows: In December, 1872, the Secretary of State made a grant of a large tract of waste land in the Gonda district to one William Cooke. The land was described in the deed of grant as situated in the village of Agya, but under subsequent settlement proceedings it seems to have been constituted a separate "village" known as Cookenagar Grant. The word "village" in this connection, however, denotes little (if anything) more than a revenue unit. In 1924, when the transactions which led to this litigation took place, the original grantee was dead, and the estate was vested under the provisions of his will in ten persons living in England, and was managed on their behalf in India by a Mr. Stern. The owners being desirous of disposing of the property, it was divided up into a number of blocks, which were offered for sale locally by Mr. Stern. Block No. 19 was purchased by the appellant, the Raja of Basti; blocks Nos. 7 and 9 by Dargahi (now deceased and represented by Sita Ram and Madho) and Mata Prasad, the respondents in two of the appeals; and blocks Nos. 10-13, 15 and 20 by Raja Mohammad Mumtaz Ali, the respondent in the third appeal. It is not now disputed that the conveyance of block No. 19 to the appellant was executed and registered on June 9, 1924, before any of the other sales were formally completed, though the conveyance of block No. 7 to Dargahi and Mata Prasad was executed on the same day, but at a later hour. The sale to Raja Mohammad Mumtaz Ali was not completed till June 18, 1924, and the second sale to Dargahi and Mata Prasad (block No. 9) not till July 21 following.

Under these circumstances the appellant claimed to preempt the other blocks, and filed three suits in the Court of

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the Subordinate Judge of Gonda against their several purchasers to enforce his claims. The two suits against Dargahi and Mata Prasad were tried together and one judgment was delivered in both, the Subordinate Judge holding that the appellant's claim in respect of block No. 7 was not established, but that his claim in respect of block No. 9 was. The one suit was therefore dismissed, and in the other a decree for pre-emption was made upon the usual terms. The third suit against Raja Mohammad Mumtaz Ali was tried by the same judge, but separately, and was also dismissed. Appeals were filed by the unsuccessful parties in each of the three cases to the Chief Court of Oudh. The appeals were apparently heard together, and were decided by one judgment, the result of which was that the appellant, the Raja of Basti, was defeated in all three cases, his two appeals being dismissed, and the appeal of the respondent purchasers of block No. 9 being allowed.

The appellant before this Board has maintained his right to pre-emption in all the three cases under the provisions of chap. 2 of the Oudh Laws Act, XVIII. of 1876.

On the argument of these appeals a number of questions have been raised of considerable complexity and depending upon the intimate construction of this somewhat abstruse enactment. Their Lordships, however, are satisfied that the appellant must fail in each of them on the threshold of the Act, having regard to certain findings of fact in which both the Courts in India have concurred.

The sales in question were all carried out on behalf of the vendors by Mr. Stern. The blocks were in the market for some time. They were clearly delineated upon separate plans, and separate khasras and jamabandis were prepared for each. The Subordinate Judge held that the appellant had procured a list of all the blocks containing the prices; that he knew that they were all in the market and could be had for these prices, but that he definitely refused to purchase any but block No. 19, which was adjacent to his own estate. The appellate Court came in effect to the same conclusion. They held that the appellant told Mr. Stern that he wished to

purchase block No. 19 only and that he did not wish to purchase any other block. The oral agreement for sale with Raja Mohammad Mumtaz Ali was entered into some time prior to the agreement with the appellant, but both Courts held that when he refused to purchase any of the other blocks he was aware of the agreement with Raja Mohammad Mumtaz Ali and acquiesced in it.

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Upon this state of facts their Lordships are clearly of opinion that, assuming that the prior completed purchase by the appellant would, under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to reassert it. This principle has been recognized in previous cases by the Oudh Courts: see *Bhagwat Singh v. Saiyad Nazir Husain* (1); *Bank of Upper India v. Munshi Alopi Prasad* (2); and *Hanuman Singh v. Adiya Prasad* (3); and it has been applied to some extent at all events by the judgment of the Subordinate Judge in the present case.

Having come to this conclusion, their Lordships will only touch briefly upon certain other questions which have formed the subject of argument before them.

The decision of the Chief Court ultimately turned upon the question whether the appellant was by reason of his purchase a member of the village community of Cookenagar Grant, inasmuch as under s. 7 of the Oudh Act the right of pre-emption is only to be presumed to exist in "village communities." This expression is not defined in the Act, and no evidence was given in any of the suits as to the existence of a "village community" in Cookenagar Grant. It was, however, contended for the appellant that, upon the death of Cooke, who was till then the sole owner of the village, the ten persons living in England who were his devisees became a village community within the meaning of the Act, and that as soon as the appellant purchased block No. 19 he became a member of that community. It may be that, as appears to have been

(1) (1902) 5 Oudh Cases, 395.

(2) (1907) 10 Oudh Cases, 257.

(3) (1919) 22 Oudh Cases, 323.

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held in other cases by the Oudh Court, only persons having an interest in the village lands should be deemed to be members of the community, though their Lordships are not prepared in the present case to affirm the correctness of this proposition; but it by no means follows from this that Cooke's devisees merely by reason of an interest in the land so acquired should be assumed to constitute a village community which was not shown to exist apart from themselves.

Another question which was the subject of considerable discussion before this Board turned upon the possible competition between the rights acquired by a contract for sale and those attaching under the Oudh Act to a completed conveyance. It was found by the Courts in India that the agreement for sale of Raja Mohammad Mumtaz Ali's plots was prior in date to the agreement for sale of block No. 19 to the appellant, but that the registered sale deed of the appellant preceded by some ten days the completion of Raja Mohammad Mumtaz Ali's purchase. Both Courts were of opinion that under these circumstances the appellant had no right of pre-emption as against Raja Mohammad Mumtaz Ali. It may be that in such a case there is a direct conflict between the statutory rights attached under chap. 3 of the Transfer of Property Act to an agreement for sale, and the right of pre-emption conferred by the Oudh Laws Act, and that this question may need further consideration at some future time. Their Lordships do not think it necessary to come to any conclusion upon it in these appeals.

The matter of notice under s. 10 of the Act was also discussed. It was admitted that no formal notice of his proposal to sell any of the plots in suit was given by Mr. Stern, but in their Lordships' view this cannot help the appellant. His refusal to purchase any of the other plots and his acquiescence in the sale to Raja Mohammad Mumtaz Ali may well have induced Mr. Stern to believe that the statutory notice was unnecessary, and if it had been given it seems clear that the present suits would have been barred by s. 11.

For the reasons already stated their Lordships are of opinion that the present appeals must fail, and they will

humbly advise His Majesty that they should be dismissed. The appellant must pay the costs of both sets of the respondents.

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Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *H. S. L. Polak; T. L. Wilson & Co.*

JAMES SKINNER (DEFENDANT) . . . , APPELLANT;

J.C.*

AND

R. H. SKINNER (PLAINTIFF) AND OTHERS RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Registration—Specific Performance—Unregistered Sale Deed—Admissibility in Evidence—Indian Registration Act (XVI. of 1908), s. 17, sub-s. 1 (b); s. 49.

A document which upon its true construction is a sale deed, purporting to transfer an interest in immovable property of the value of Rs.100 and upwards, is precluded by s. 49 of the Indian Registration Act, 1908, from being admitted in evidence in a suit for specific performance of the agreement to transfer said to be contained therein unless it is registered in accordance with the Act.

Sanjib Chandra Sanyal v. Santosh Kumar Lahiri (1921) I. L. R. 49 C. 507; *Satyanarayana v. Chinna Venkata Rao* (1925) I. L. R. 49 M. 302; and *Ramling Parwatayya v. Bhagwant Sambhuappa* (1925) I. L. R. 50 B. 334 approved.

Decree of the High Court reversed as to construction of the document.

APPEAL (No. 97 of 1928) from a decree of the High Court (January 22, 1926) reversing a decree of the Additional Subordinate Judge of Meerut (May 19, 1923).

The suit was brought by the first respondent against the administrator of Richard Skinner (represented in the appeal by the second respondent) for specific performance. The plaintiff alleged an agreement dated June 18, 1921, by George C. E. Skinner for the sale to him of properties which George had inherited from his brother Richard. The appellant

* Present: LORD CARSON, LORD DARLING, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES, and SIR BINOD MITTER.

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was the executor of Alice Skinner, a sister of Richard and George; she was made a defendant as claiming a half-share in Richard's estate.

The terms of the document of June 18, 1921, appear fully from the judgment of the Judicial Committee.

Issue No. 9 raised the question whether the document was admissible in evidence.

The trial judge held that the document was a sale deed, and that as it was not registered under the Indian Registration Act, 1908, it was inadmissible in evidence; accordingly he dismissed the suit.

Upon appeal the decree was reversed and an order made for specific performance of the agreement by the conveyance of George's interest at the conclusion of the administration. The learned judges (Lindsay and Kanhiya Lal JJ.) were of opinion that the document, having regard to the whole of its terms and the circumstances in which it was executed, ought to be treated as an agreement for sale, and that consequently they had a discretion to decree specific performance although the document was not registered.

1929. June 10, 11, 13. *De Gruyther K.C. and Kenworthy Brown* for the appellant. The document of June 18, 1921, upon its true construction, was a sale deed transferring the vendor's interest in his brother's property; it was therefore within s. 17, sub-s. 1 (b), of the Registration Act. It did not merely create a right to another document so as to be within s. 17, sub-s. 2 (v). Consequently it was inadmissible in evidence having regard to s. 49.

Dunne K.C. and E. B. Raikes for the first respondent. The document was merely an agreement to sell such share as the vendor got upon the administration being concluded; a conveyance was contemplated when that took place. It was not clear until that took place whether immovable property would be transferred. But even if the document operated as a transfer of immovable property it was admissible in evidence in the suit as an agreement and for the purpose of obtaining specific performance: *Bengal Banking Corporation v.*

Mackertich (1), following the view of West J. in *Burjorji Cursetji Panthakur v. Muncherji Kuverji* (2); *Mangamma v. Ramamma* (3), following earlier Madras decisions. Certain later decisions in India have taken a different view, but, it is submitted, the construction of the Act adopted by West J. is correct, and the only construction giving consistency to all the provisions of s. 17. In *Dayal Singh v. Indar Singh* (4), though a similar question was discussed, the Board expressly refrained from deciding that that view was wrong.

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Kenworthy Brown in reply. The actual decision in the *Bengal Banking Corporation* case (1) does not support the appellant; the remarks of Garth C.J. relied on were obiter. *Burjorji Cursetji's* cases (2) is inconsistent with *Purmanandas Jiwandas v. Dharsey Virji* (5), and with a series of more recent cases in most of the High Courts. [Reference was made to the cases mentioned in their Lordships' judgment and others.] The question is also concluded by the judgments of the Board in *Hemanta Kumari Debi v. Midnapur Zamindari Co.* (6) and *Dayal Singh v. Indar Singh*. (4) If the document is, as this respondent contends, within s. 17, then by s. 49 (c) it could not "be received as evidence of any transaction affecting" the property; the provision is clear and conclusive.

July 16. The judgment of their Lordships was delivered by

SIR GEORGE LOWNDES. One Richard Skinner died in 1913 intestate, and his estate, which included immovable properties of considerable value, devolved upon his brother George Skinner and his sister Alice Skinner in equal shares. Richard Skinner was at the time of his death indebted to the Delhi and London Bank, and administration of his estate was granted to a Mr. Angelo, the bank's manager.

On June 18, 1918, while the estate was still under administration, George Skinner executed in favour of Robert Hercules

(1) (1883) *E. L. R.* 10 C. 315.

(2) (1880) *I. L. R.* 5 B. 143.

(3) (1912) *I. L. R.* 37 M. 480.

(4) (1926) *L. R.* 53 I. A. 214.

(5) (1885) *I. L. R.* 10 B. 101.

(6) (1919) *L. R.* 46 I. A. 240.

J. C. Skinner, the first respondent in this appeal, a document in
1929 the following terms:—

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[The first sentence is torn out.]

“This day between Mr. (torn out) at present at Meerut of the one part, hereinafter called the first party, and Mr. R. H. Skinner of Hansi of the second part, hereinafter called the second party.

“Whereas Mr. G. C. E. Skinner, the said first party (paper torn), heir to the estate of his late brother, Mr R. R. Skinner, and the said first party therefore as heir has a (paper torn) in the property allotted to the late Mr. R. R. Skinner by the decree of the District Judge, Delhi, of August, 1888, partitioning the joint Skinner estate; and in all the property he subsequently acquired. And that whereas my brother R. R. Skinner died in about August, 1913, and that since his death there has been constant trouble and long, expensive and ruinous litigations and family disagreement, etc., owing to which vendor has not been able to get possession up to date, nor gets any benefit from it whatsoever.

“That whereas now Mr. R. H. Skinner of the second part, hereafter called the vendee, has agreed to purchase all these properties left me by my said late brother, Mr R. R. Skinner.

“Therefore I, G. C. E. Skinner of the first part, hereafter called the vendor, with my free will, wishes and consent do hereby sell all my share, I have inherited from my late brother, Mr R. R. Skinner, to Mr R. H. Skinner for Rs. fifty thousand, to keep the property in the family and for all what the vendee has done for me, it is therefore mutually agreed as follows:—

“1. That the vendee, Mr R. H. Skinner, do pay to the said vendor, Mr G. C. Skinner, Rs. one thousand as earnest money by cheque.

“2. That as all this property is in the hand of Mr. Angelo, the administrator of the estate of my late brother, Mr. R. R. Skinner, the vendor will do his best to get the vendee full possession.

“3. Should for any reason the vendor fail or do not satisfy the vendee, in this case the vendee has my free consent to

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take any action he considers proper and necessary to get full possession, and mutation of names done in the said vendee's favour.

"4. From the date of agreement all expenses for litigation now pending which, if the vendor chooses to hand over to the vendee or that may hereafter be filed by the vendee in the above matter, will be borne by the vendee.

"5. That the cases now pending and all matters with reference to these properties, the said vendor shall give a correct and complete list of all cases, also a list of all papers and books, etc., in the possession of the said vendor to the said vendee and take a receipt for any reason, the vendor fail, the vendor will be responsible for loss, etc., and not the vendee.

"6. In addition to the price stated above the said vendee will have to pay the Delhi and London Bank, Delhi, vendor, share of the debt left by the late Mr. R. R. Skinner, but the said vendor will pay all debts the said vendor may have contracted on this said property after the death of the late Mr. R. R. Skinner and release it for the vendee.

"7. That the vendor declares that he is the sole heir to this said property, but should other heirs be established . . . by order of any Court the vendor is not responsible.

"8. The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assigns, etc., in favour of the said vendee . . . and if the vendee should ever consider necessary to execute a Registered sale-deed . . . vendor or his heirs, assigns, etc. will always be ready to execute and register the same at the expenses of the vendee.

"9. In virtue of this sale and agreement if the vendee considers necessary the vendor will always be ready to execute and register a power of attorney or give the vendee any other document or help the vendee may demand.

"10. The balance of Rs. forty-nine thousand will be paid by the vendee to the vendor the very year the vendee gets full legal possession of all the properties and the mutation of names all affected in the name of the vendee.

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" 11. Should the vendee not be able to get mutation of names done in his name and get full and complete possession during the lifetime of the vendor the vendor in such case directs the vendee or his heir, Mr. J. A. R. Skinner, to pay the balance due to the heirs of the vendor.

" 12. The schedule of the properties sold is hereunto annexed as noted below: (a) All the properties noted in the decree of the District Judge, Delhi, August, 1888, partitioning the joint Skinner estates. (*Ingram v. Orde* and others.) (b) All the properties acquired by the late Mr. R. R. Skinner up to the time of his death. Therefore we, the undersigned, further confirm and ratify this sale and agreement by our signatures.....

" Meerut, June 18, 1918.

(Sd.) GEORGE C. E. SKINNER, Vendor.

(Sd.) R. H. SKINNER, Vendee."

The above document was not registered.

George Skinner died intestate in December, 1919, and on February 11, 1921, the first respondent instituted the suit out of which this appeal arises. The only defendant to the suit as originally framed was Angelo, the administrator of Richard Skinner's estate, and the principal prayer of the plaint was for specific performance of "the agreement of sale dated June 18, 1918"—the reference being to the document above set out—and for possession of the property. It is obvious that Angelo did not represent George Skinner's estate, and it is admitted that in this respect the suit was defective, but various parties were subsequently added, including Alice Skinner, whose right to a half-share in Richard Skinner's estate was disputed in the Court of first instance, and Thomas Skinner, the third respondent, who was appointed administrator *ad litem* of George Skinner. Major Stanley Skinner was also substituted for Angelo as administrator of Richard Skinner, and on the death of Alice Skinner, pending the proceedings in India, James Skinner, the present appellant, was brought on the record as her executor.

Various matters were debated in the course of the proceedings in India, with which their Lordships have not been asked to deal, but the principal issue in the case, and that upon which the determination of this appeal depends, was whether the document of June 18, 1918, was admissible in evidence. This in the argument before the Board has resolved itself into two questions—namely (1.) whether the document comes within the provisions of s. 17 of the Indian Registration Act XVI. of 1908, and so required registration; and (2.) whether, if registration was necessary, it could form the basis of a suit for specific performance notwithstanding the provisions of s. 49.

On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale deed requiring registration under s. 17, and that, being unregistered, it was not admissible in evidence, and he accordingly dismissed the suit. The High Court, on appeal, differed from this conclusion. The learned judges held that the document ought to be "treated as being an agreement for sale rather than as a sale deed," and that, therefore, registration was not necessary, and they made a decree for specific performance in respect of George Skinner's moiety of the property upon certain terms. Against this decree the executor of Alice Skinner has appealed to His Majesty in Council.

In the course of the arguments the document of June 18, 1918, has been discussed with great minuteness, but their Lordships have no doubt that the view taken of it by the Subordinate Judge was right. The language employed is perhaps not that of a trained draftsman, but it clearly purports to transfer George Skinner's interest in the immovable properties which he had inherited from Richard Skinner, particulars of which are set out in the schedule, and it accordingly comes within the terms of s. 17 of the Act and required registration.

The second question is perhaps a more difficult one, though the difficulty arises rather from the divergent views to be found in the Indian case law on the subject than from the

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interpretation of s. 49 of the Registration Act. It is unfortunate that this aspect of the case was not submitted to the Indian Courts, and their Lordships have therefore not had the assistance of the High Court in discussing the numerous decisions which have been referred to before them.

Their Lordships, however, think that the meaning of s. 49 is clear.

The section runs as follows: "49. No document required by s. 17 to be registered shall—(a) affect any immovable property comprised therein; or (b) confer any power to adopt; or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

If an instrument which comes within s. 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceeding to bring about indirectly the effect which it would have had if registered. It is not to "affect" the property, and it is not to be received as evidence of any transaction "affecting" the property.

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale deed, and it is contended for the first respondent that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of s. 17, sub-s. 2 (v), which exempts from registration, and therefore frees from the restriction of s. 49, a document which does not itself create an interest in immovable property, but merely creates a right to obtain another document which

will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

A number of cases from the Indian Reports have been referred to on either side in the argument before this Board, and it is clear that many of the decisions are irreconcilable. Their Lordships think, therefore, that no good purpose would be served by a detailed examination of them, but they have the satisfaction of knowing that the principle which has been enunciated above is in accordance with recent decisions in most of the High Courts: see *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (1); *Satyanarayana v. Chinna Venkata Rao* (2); *Ramaling Parwatayya v. Bhagwant Sambhuappa*. (3)

For the reasons given their Lordships are of opinion that the High Court was wrong in granting a decree for specific performance, and that the first respondent's suit should have been dismissed. They will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, and that of the trial judge restored. The first respondent must pay the appellant's costs both here and in the High Court.

Solicitors for appellant: *Chapman-Walker & Shephard.*

Solicitors for first respondent: *T. L. Wilson & Co.*

(1) (1921) I. L. R. 49 C. 507.

(2) (1925) I. L. R. 49 M. 302.

(3) (1925) I. L. R. 50 B. 334.

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J. C.* RAGHUNATH PRASAD SINGH AND }
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 ——————
 July 25. AND

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ON APPEAL FROM THE CHIEF COURT AT OUDH.

Hindu Will—Bequest of absolute estate subject to restrictions—Limitation purporting to entail estate—Paramount Intention of Testator—Indian Succession Act (X. of 1865), ss. 74, 82.

The will of a Hindu taluqdar who died without issue provided that "subject to some provisions and restrictions given below," his entire estate should on his death "vest in" P., the third son of his nephew, who "shall be my heir and successor." Provisions and restrictions followed to the effect that the estate was to pass on P.'s death to his successors, and that he and they were to be bound to adhere to the Hindu religion and were not to have the power to alienate, the succession to be according to the rule of primogeniture; and it was stated that the testator's sole wish was "that the estate may remain with the male heirs of his sombansi family." It was contended that the intention was to give P. and each of his successors a life interest, and that this limitation to the successors being invalid, the estate reverted on P.'s death to the heirs of the testator:—

Held, that the words in the earlier part of the will created an absolute estate of inheritance in P., and that the provisions and restrictions were an attempt to impose repugnant conditions on the estate so created, and were therefore void. Applying ss. 74 and 82 of the Indian Succession Act, 1865, the paramount intention of the testator, as shown in the will, was to be ascertained, and in the present case it was to benefit P. and his branch of the family.

Decree of the High Court affirmed.

APPEAL (No. 44 of 1928) from a decree of the Chief Court of Oudh (April 27, 1926) affirming a decree of the Subordinate Judge of Partabgarh (April 22, 1924).

The suit was brought by Jagdeo Singh, the father (since deceased) of the appellants, who claimed that on the death of his younger brother, Partab Bahadur Singh, he was entitled to succeed as heir to their uncle Raja Ajit Singh, who died in 1889. The plaintiff contended that under the will of

* Present: LORD CARSON, LORD DARLING, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES, and SIR BINOD MITTER.

Ajit Singh, dated November 6, 1884, Partab took only a life interest, all the other provisions being invalid; that upon Ajit Singh's death, Sitla Baksh Singh (the father of the plaintiff and of Partab) succeeded as heir subject only to the life estate of Partab, and that the plaintiff was entitled as successor of Sitla under the Oudh Estates Act, 1869, and by the custom of primogeniture.

The Chief Court (Stuart C.J. and Wazir Hasan J.), affirming the view of the trial judge, held that upon the true construction of the will Partab took an absolute estate. The suit was accordingly dismissed.

1929. July 13, 14, 17. *Dunne K. C.* and *Jopling* for the appellants.

De Gruyther K. C., *Wallach* and *Dube* for the respondents.

[Reference was made to *Tagore v. Tagore* (1); *Tarakeswar Roy v. Soshi Shikhareswar* (2); *Kristoromoney Dossree v. Narendra Dossree* (3); *Radha Prosad Mullick v. Ranimoni Dassi* (4); *Skinner v. Naunihal Singh* (5); *Bhaidas Shirdas v. Bai Gulab.* (6)]

July 25. The judgment of their Lordships was delivered by SIR BINOD MITTER. This is an appeal from the decree dated April 27, 1926, of the Chief Court of Oudh, affirming the decree of the Subordinate Judge of Partabgarh dated April 22, 1924. The litigation relates to properties originally owned by one Raja Ajit Singh, who died on December 18, 1889, having devised and bequeathed those properties to Rajah Partab Bahadur Singh by his will dated November 6, 1884. Rajah Partab Bahadur Singh died on June 18, 1921.

The principal question for determination in the present appeal is whether on the true construction of the said will Partab took a life interest or an absolute interest in the property devised by the said will. The appellants (who are the heirs of Raja Ajit Singh) claimed to be entitled to the

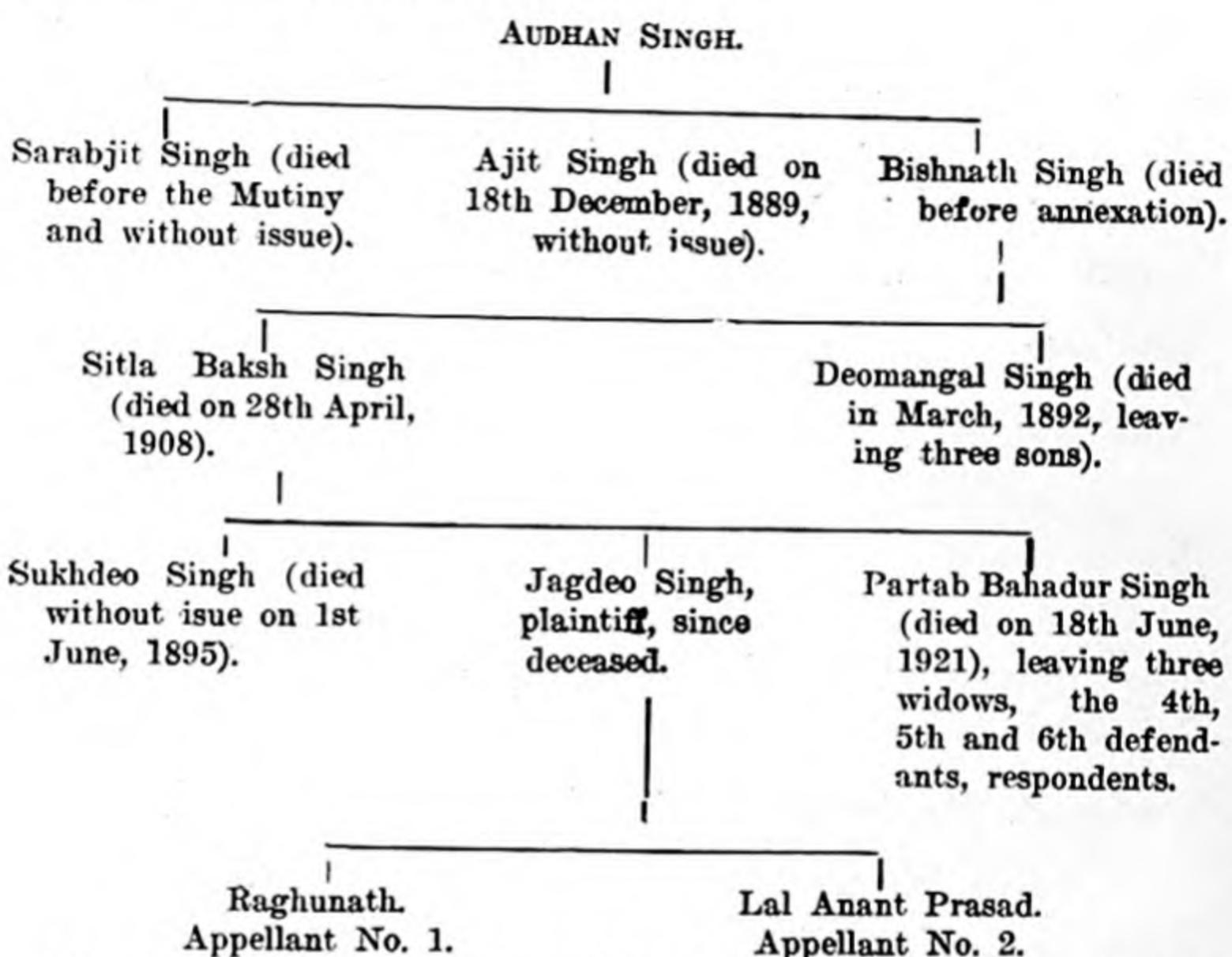
(1) (1872) L. R. I. A. Supp. 47. (4) (1908) L. R. 35 I. A. 118.
 (2) (1883) L.R. 10 I. A. 51. (5) (1913) L. R. 40 I.A. 105.
 (3) (1888) L. R. 16 I. A. 29. (6) (1921) L. R. 49 I. A. 1.

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property in dispute in this appeal on the footing that Partab took only a life interest under the said will, and the respondents 4 to 9, who are devisees or transferees of or from Partab, contend that Partab took an absolute interest under the will.

The following pedigree shows the relationship of the parties to the present litigation:



The learned Chief Judge of the Chief Court of Oudh has given an account showing how Ajit Singh acquired the properties which he disposed of by his will. It is therefore not necessary to reiterate the same. It is sufficient to state that Raja Ajit Singh was a talukdar of Oudh and his name was entered as such in the lists 1, 2 and 5 prepared under s. 8 of Act I. of 1869.

The said will contains (inter alia) the following provisions: "As I have got no self-begotten son so according to the powers given by the law of Government and under the custom prevailing in the province, I have to express my heart's desire by this will *subject to some provisions and restrictions* given below in order that, *on my death*, according to my desire this document may be acted upon without any dispute,

viz., after my death my entire estate and property movable and immovable already acquired by me or acquired hereafter before my death *shall all vest* in Lal Partab Bahadur Singh, son of Sitla Bakhsh Singh, who, according to my experience, is very competent and worthy man, and I trust he shall follow all the religious principles of Hindus and shall pass his whole life in a good manner. Lal Partab Bahadur Singh *shall be my heir and successor*. The said heir *after* he has inherited me, shall be bound to abide by all the following terms." The italics are for the purposes of this judgment.

Then follow various terms which the testator Ajit said that the heir would be bound to follow. Clause 1 provides that the heir shall be bound to adhere strictly to the Hindu religion. Clause 2 declares that the heir shall have no power to transfer any immovable property bequeathed under the will, and further declares that the bequeathed taluka entire and compact shall gradually descend to the successors of the legatee subject to the restrictions laid down as binding upon the legatee. Clause 3 directs that the legatee and his representatives shall have no power to alienate the properties. Clause 4 empowers the legatee to deal with the property acquired or purchased by him from the income and savings of the property bequeathed.

Clauses 5 and 8 are of great importance and are as follows: "5. If the legatee passes his period of life in accordance with my desire then after his death this estate and property, be it the *Ilaqa* acquired under *sanad* or obtained under a grant made by British Government, shall according to the rules of primogeniture subject to the above provisions and the terms of the *sanad* granted by Government pass to the successors of the legatee without *division and distribution* under clauses 1, 2, 3, 6 and 11 of section 22, Act I. of 1869. But the heir also, whoever he may be, shall be bound to abide by all these provisions whatever may be the law."

"8. In executing this will the clauses 4, 5, 7, 8, 9 and 10 of section 22, Act I. of 1869 have been purposely avoided because the heart's desire of the testator is solely this, that the estate may remain with the *male heirs of his somansi family*

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and the above said clauses are quite contrary and against this desire."

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Clause 7 declares that if the legatee or any of the successors of the legatee accepts any other religion, giving up the Hindu religion or contrary to the provisions of the will, transfers the property bequeathed wholly or in part, and in consequence thereof he is suspended under the orders of the Government or by suit filed by the rightful heir after it had been fully proved, then conditions of provision 5 shall at once attach to the inheritance.

On May 1, 1922, Jagdeo Singh, who was the brother of Partab and father of the appellants, instituted the present suit in the Court of the Subordinate Judge of Partabgarh, alleging that Partab had only acquired an estate for life under the will of Ajit Singh, and that on his death the same passed to him (Jagdeo) as the heir of Ajit Singh. Jagdeo died during the pendency of this litigation, leaving his two sons, who are the present appellants. The trial Court, as well as the Chief Court of Oudh, held that Partab acquired an absolute estate of inheritance.

The appellants contended that in the earlier part of the will the words "the properties shall vest in Partab" and that "Partab shall be my heir and successor," are ambiguous and do not show any clear intention to create an absolute estate in favour of Partab. They further contended that clause 5 shows a clear intention on the part of the testator to create successive life estates in the manner provided by that clause, and this construction, they argued, is further borne out by a reference to clauses 1, 2, 3 and 7 of the will. Their contention, further, is that successive life estates are bad except in cases where such bequests are in favour of persons who are capable of taking the interest as "purchasers" under the will (*Tagore v. Tagore* (1)) and therefore that Partab only acquired an estate for life and on his death the estate vested in the original plaintiff Jagdeo Singh.

The respondents contended that the words "property shall vest in Partab," and that "Partab shall be my heir and

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successor," are clear dispositive words conferring an absolute estate in Partab, and that the subsequent clauses, i.e., 1, 2, 3, 5 and 7 are merely conditions subsequent which are repugnant to an absolute estate and must therefore be rejected.

Attempts on the part of a testator in India to restrict devolution of properties which he bequeaths to a legatee absolutely and to prevent alienations of such properties are quite common, and wills containing such provisions have often come up for decision before the Board. The question for determination has always been whether there are dispositive words creating an estate of inheritance, in the first instance; and, if so, whether the subsequent restrictive clauses are sufficient to displace the effect of such dispositive words or whether such subsequent clauses are merely repugnant to the absolute estate: *Bhaidas Shirdas v. Bai Gulab.* (1).

A large number of decisions were cited both by the appellants and the respondents, but they are useful only in so far as they lay down the principles of law which have to be observed in construing the present will.

Their Lordships of the Judicial Committee in *Sasiman Chowdhurain v. Shib Narayan Chowdhury* (2) said: "It is always dangerous to construe words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case."

The rule of construction embodied in s. 82 of the Succession Act of 1865, which applies to this will, is that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him.

The other rule of construction embodied in s. 74 of the Succession Act and also applicable to this will, is "that the intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it so far as possible." Cases are not rare in which a court of construction, finding that the whole plan of the donor of the property cannot be carried out, will yet uphold that

(1) (1921) L. R. 49 I. A. 1.

(2) (1921) L. R. 49 I. A. 25, 32.

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part of it which gives effect to the paramount intention of the testator rather than hold that the will should fail entirely.

The question therefore is what was the paramount intention of the testator as expressed in this will. Reading the will as a whole, it appears that the testator's primary intention was to benefit Partab and his branch of the family. The testator further did not intend his immediate heir and the latter's branch of the family to have any interest in the estate. With that view he made Partab his heir and successor.

Now, a male heir when he inherits takes the estate absolutely, and it seems to their Lordships that the testator intended that Partab should have the same interest as if Partab were his real heir.

Their Lordships are of opinion that the words in the will "that the estate shall vest in Partab" and that he shall be the testator's "heir and successor" are clear dispositive words creating an absolute estate of inheritance in Partab, and they are further of opinion that the various clauses referred to above which were to come into operation after he had so inherited, must be regarded as an attempt to impose repugnant conditions upon the estate so created and are, therefore, void.

Their Lordships, therefore, hold that Partab acquired an absolute interest in the estate.

Their Lordships, however, are of opinion that the difficulty in the construction of this will has been caused by the language used by the testator himself, and they think that the costs incurred by all parties in this litigation in all its stages should come out of the estate. The respondents between themselves will be entitled to one set of costs.

Their Lordships will accordingly advise His Majesty that this appeal and the suit should be dismissed, but that the costs of the appellants and one set of costs for the respondents should come out of the estate.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Solicitor, India Office:*
H. S. L. Polak.

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 . (DEFENDANTS) } July 25.
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ON APPEAL FROM THE HIGH COURT AT RANGOON.

Registration—Registration of Document not duly stamped—Error of Procedure—Good Faith—Validity of Registration—Transfer to defeat Creditors—Preference of one Creditor—Transfer of Property Act (IV. of 1882), s. 53—Indian Stamp Act (II. of 1899), ss. 35, 37—Indian Registration Act (XVI. of 1908), s. 87.

Registration of an instrument not duly stamped, contrary to s. 35 of the Indian Stamp Act, 1899, is an error of procedure, not an act done without jurisdiction; consequently if it is done in good faith the registration is valid under s. 87 of the Indian Registration Act, 1908, and upon payment of the proper duty and penalty the instrument is admissible in evidence.

Mujibunnissa v. Abdul Rahim (1900) L. R. 28 I.A. 15 distinguished.
Sarada Nath Bhattacharya v. Gobinda Chandra Das (1919) 23 Cal. W. N. 534 approved.

Where an instrument bears a stamp which is of sufficient amount but is surcharged as a court fees stamp, the stamp is "of improper description" within s. 37 of the Indian Stamp Act, 1899, and the remedial provisions of the rules made thereunder apply.

Reference under s. 57 of Act II. of 1899 (1901) I. L. R. 23 A. 213 disapproved so far as it concerns court fees in their present form.

A mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under s. 53 of the Transfer of Property Act, 1882, as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property.

Musahar Sahu v. Hakim Lal (1915) L. R. 43 I. A. 104 followed.

Judgment of the High Court reversed as to s. 53 of the Transfer of Property Act.

APPEAL (No. 102 of 1928) from a decree of the High Court (July 15, 1927) modifying a decree of the District Judge of Magwe.

The suit was instituted by the appellants to enforce a mortgage dated March 13, 1924.

* Present: LORD ATKIN, SIR JOHN WALLIS, SIR GEORGE LOWNDES, and SIR BINOD MITTER.

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The questions arising upon the appeal were (1.) whether the mortgage was invalid under s. 53 of the Transfer of Property Act, 1882; and (2.) whether the registration of the mortgage was invalid, because when registered it was not duly stamped, as required by the Indian Stamp Act, 1899, s. 5.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

Both Courts in India held that the registration having been effected in good faith it was valid under s. 87 of the Indian Registration Act, 1908, although the instrument was not duly stamped at that time.

The District Judge decreed the suit, holding that though the mortgage was a preference of the mortgagees over other creditors of the mortgagors it was not invalid under s. 53 of the Transfer of Property Act.

Upon appeal to the High Court the learned judges (Heald and Mya Bu J.J.) were of the contrary opinion; accordingly they varied the decree to a simple money decree.

1929. June 27, 28. *De Gruyther K.C.* and *Pennell* for the appellants. The mortgage was not invalid under s. 53 of the Transfer of Property Act, even if its intention and effect were to prefer the mortgagees over other creditors: *Musahar Sahu v. Hakim Lal.* (1) Both Courts in India held, following *Sarada Nath Bhattacharya v. Gobinda Chandra Das* (2), that the registration was valid under s. 87 of the Registration Act.

Dunne K.C. and *E. B. Raikes* for the respondents. Upon the facts the High Court was justified in holding that the mortgage was not only a preference of one creditor, but a scheme for the purpose of defeating the other creditors, and therefore void under s. 53. But in any case the mortgage was not validly registered, and consequently could not be received in evidence. Sect. 35 of the Stamp Act, 1899, imperatively forbids the registration of an instrument which is not duly stamped. The registering officer therefore had no jurisdiction to register it, and s. 87 of the Registration

Act cannot be invoked: *Mujibunnissa v. Abdul Rahim* (1); *Jambu Parshad v. Muhammad Aftab Ali Khan* (2); *Ma Shwe Mya v. Maung Ho Hnaung*. (3) The decision in *Sarada Nath's* case (4) was erroneous. The stamp used was not merely a stamp "of improper description" within the meaning of s. 38 of the Stamp Act: *Reference under s. 57 of Act II. of 1899*. (5) The Stamp Act has been amended twice since that decision without any alteration in the section.

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De Gruyther K. C. in reply. The amount of the stamp was sufficient, the only defect being that the revenue stamp used had been surcharged for use for the payment of court fees. That being so the instrument was duly stamped within the meaning of s. 35 of the Stamp Act, since that Act recognizes only two descriptions of stamps—namely, adhesive stamps and impressed stamps: *Annapurnabai v. Lakshman Bhikaji Vakharkar*. (6) But in any case the requirement of s. 35 of the Stamp Act is a matter of procedure, and s. 87 of the Registration Act prevents an error made in good faith from vitiating the registration. The considerations in *Sah Mukhun Lall Panday v. Sah Koondun Lal* (7) affirmed in *Mohammed Ewaz v. Birj Lall* (8) apply. The decisions of the Board relied on by the appellants all related to presentation by an authorized person, and different considerations apply to cases of that kind.

July 25. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decree of the High Court of Judicature at Rangoon. The plaintiffs are the mortgagees under a mortgage dated March 13, 1924, by which Maung Po Saung and his wife Ma Twe mortgaged to the plaintiffs for Rs.20,000 four oil wells in the Yenangyaung oil field. The consideration for the mortgage is alleged to be a sum of Rs.13,764, the balance of principal and interest on three promissory notes dated June 25, 1921, November 25, 1921, and May 30, 1923, for the sums of Rs.7700, Rs.1700,

(1) (1900) L. R. 28 I. A. 15.

(2) (1914) L. R. 42 I. A. 22.

(3) (1922) L. R. 49 I. A. 395.

(4) (1919) 23 Cal. W. N. 534

(5) (1901) I. L.R. 23 A. 213

(6) (1894) I. L. R. 19 B. 145.

(7) (1875) L. R. 2 I. A. 210, 216.

(8) (1877) L. R. 4 I. A. 166, 176.

J. C. and Rs.2600 respectively, and made by the mortgagors in
 1929 favour of the first-named mortgagee and her husband. The
 MA PWA second-named mortgagee is Ma Pwa May's son. His wife
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and Rs.2600 respectively, and made by the mortgagors in favour of the first-named mortgagee and her husband. The second-named mortgagee is Ma Pwa May's son. His wife is the niece of Maung Po Saung, one of the mortgagors. The further consideration, making up the total sum of Rs.20,000, is alleged to be a present advance of Rs.6236 in cash. The mortgage was registered on March 14, 1924. There is no doubt that at the date of this mortgage the mortgagors were heavily indebted. One of their creditors was the respondent firm, who on March 20, 1924, instituted a suit against them to recover Rs.13,295, principal and interest, due on two promissory notes dated March 27, 1923. On May 13, 1924, the respondents obtained an order before decree for the attachment of the mortgagors' property, including the four wells, the subject of the mortgage in question. On June 10 the appellants, the mortgagees, having demanded payment without success, brought the present suit against the mortgagors to enforce the mortgage.

The respondent firm applied to be added as a party to the suit as a necessary party under Order xxxiv., r. 1, and on September 6, 1924, the District Judge made the order. A question was raised in the Courts below, but not before their Lordships, as to whether this order was correct. Their Lordships must not be taken as expressing an opinion upon this matter. The respondents thus added as defendants put in a written statement by which they alleged that the mortgage deed was executed without consideration and for the purpose of defrauding the respondents. They also pleaded that the document was improperly stamped, and that in consequence the registration was invalid and the document was also inadmissible in evidence.

The issues fixed by the District Judge on the first plea were: (1.) Was the mortgage deed executed by the mortgagors and for valuable consideration? (2.) Was the mortgage deed executed in collusion with the plaintiffs for the purpose of defrauding the third defendant?

The claim that the deed was void was based on s. 53 of the Transfer of Property Act, 1882, which provides that any

transfer of immovable property made with intent to defeat and delay the creditors of the transferor is voidable at the option of any person so defeated or delayed. The learned District Judge, after hearing evidence, found that the deed was duly executed by the mortgagors, and the consideration was truly stated in the deed, i.e., that the promissory notes referred to were genuine notes on which the mortgagors were indebted to the mortgagees in the sums mentioned, and that the cash advance was in fact made. There appears to be no finding to the contrary by the High Court, who nevertheless came to the conclusion that the mortgage was made with intent to defeat and delay the creditors. This finding appears to their Lordships to be inconsistent with what must be taken to be the fact that the mortgagees were actual creditors of the mortgagors. A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within s. 53: "The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock*. (1) So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to the preferred creditor, there being in the case no question of bankruptcy. . . . The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another; but this in itself is no ground for impeaching it under the section, even if the debtor was intending to defeat an anticipated execution by the plaintiff."

Their Lordships find it unnecessary to add anything to the above authoritative exposition of the law of Lord Wrenbury

(1) (1876) 2 Ch. D. 104, 108.

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J. C. in giving the decision of the Board in *Musahar Sahu v. Hakim Lal.* (1) The plea of the respondents, therefore, on the merits failed.

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It is necessary, however, to determine the issues raised by the objection to the stamp and the consequent objection to the registration. The point is highly technical and is as follows: The mortgage was executed on a sheet which bore not an ordinary revenue stamp, but a court fee stamp. The stamp appears to be the ordinary impressed revenue stamp, but surcharged with the words "court fee" stamped over it. The amount of the stamp in this case is sufficient to satisfy the revenue requirements, but the respondents contend that the document is not "duly stamped" within the meaning of the Stamp Act, 1899. By s. 35 of that Act: "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped." Hence, say the respondents, the document (a) could not be admitted in evidence; (b) could not have been validly registered, therefore was unregistered; therefore under s. 49 of the Registration Act, 1908, could not affect the immovable property comprised therein. This contention has been rejected by both Courts below, and their Lordships agree with their decision. What happened in the suit was that, before the respondents filed their written statement calling attention to the stamp objection, the plaintiffs applied to the Court for return of the mortgage deed in order that they might apply to the Collector for rectification of the error. The District Judge found himself bound by s. 33 of the Stamp Act to impound the document, and eventually by direction of the High Court it was forwarded to the Collector under s. 38, sub-s. 2, of the Act, who, on payment of a further duty of Rs.100 and a penalty of Rs.5, certified it to be duly stamped. It was then received in evidence in the District Court. It follows that, in accordance with s. 36 of the Act, its admission could not be called in question at any stage of

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the suit on a stamp objection. The question of admissibility is thus disposed of.

The attention of their Lordships was called to the provisions of s. 37, which enables the Governor-General in Council to make rules providing that where an instrument bears stamps of sufficient amount, but of improper description, "it may on payment of the duty with which the same is chargeable be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution." Their Lordships entertain no doubt that in pursuance of this section and the rules made thereunder (r. 16 of the rules of February 17, 1899), the Collector would have been entitled in this case to exercise the powers given by the section. The contention to the contrary is that the section has no reference to any stamp except a revenue stamp pure and simple, and that a revenue stamp surcharged "court fee" is not within the meaning of the section a stamp of improper description. This appears to their Lordships to be putting too narrow a construction upon a remedial section, and their Lordships would not be prepared to assent to the opinion of the High Court of Allahabad in *Reference under s. 57 of Act II. of 1899* (1), so far as it concerns court fee stamps in their present form. It is plain, however, that the Collector was not asked to exercise his powers under s. 37, but under s. 38, sub-s. 2, and s. 40 (b). These sections do not contain the provision in s. 37 that the document when certified shall be deemed to have been duly stamped as from date of execution. It is necessary, therefore, to consider the objection to the registration on the ground that, when registered, the document was not duly stamped. The plaintiffs meet this objection by relying upon the terms of s. 87 of the Registration Act, which provides that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." In seeking to apply this section it is important to distinguish between

(1) (1901) I. L. R. 23 A. 213.

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defects in the procedure of the registrar and lack of jurisdiction. Where the registrar has no jurisdiction to register, as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction, or where the presentation is out of time, the section is inoperative: see *Mujibunnissa v. Abdul Rahim*. (1) On the other hand, if the registrar having jurisdiction has made a mistake in the exercise of it, the section takes effect.

Their Lordships have no doubt that the mistake is an error in procedure. The prohibition against registration is included in s. 35, amongst similar prohibitions as to admitting in evidence and authenticating, which can only be regarded as procedure. The duty of the registering officer is to scrutinize the stamp and pass an opinion on its adequacy, as he purports to do in this very document. It would be remarkable that, if he made a mistake of possibly a few annas on the amount of stamp required, and admitted a document to registration, it would be treated as having no effect years afterwards. Their Lordships are fortified in this view by former decisions of this Board. In *Sah Mukhun Lall Panday v. Sah Koondun Lall* (2) the registrar had registered a deed of sale in the absence of the vendors contrary to the provisions of s. 36 of the Act. The Board held that, having once been presented for registration, it was still in time for regular registration, though the first registration may have been invalid. There appears to have been an admission by the parties that the first registration was not valid. But the Board indicated an opinion that the first registration was validated by the provisions of s. 88 of the Act (now s. 87). Sir Barnes Peacock, in delivering the opinion of the Board, said: "In considering the effect to be given to s. 49, that section must be read in conjunction with s. 88, and with the words of the heading of part 10, 'Of the effects of registration and non-registration.' Now, considering that the registration of all conveyances of immovable property of the value of Rs.100 or upward is by the Act rendered compulsory, and that proper legal advice is not generally accessible to

persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register the mistake may be rectified upon appeal, under s. 83, or upon petition under s. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

The opinion there expressed was adopted by the Board in *Mohammed Ewaz v. Birj Lall* (1), where two of the persons executing the deed admitted execution by themselves, but denied execution by the third party. The principle has been applied to registration of an insufficiently stamped deed by the High Court of Calcutta in *Sarada Nath Bhattacharya v. Gobinda Chandra Das* (2), a decision of which their Lordships approve. On this part of the case both the Courts below decided in favour of the plaintiffs, relying upon the decision of the High Court of Calcutta above cited.

Their Lordships are therefore of opinion that the plaintiffs were entitled to succeed in the suit. The appeal should be allowed. The decree of the High Court should be set aside, and the decree of the District Judge restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants here and in the High Court.

Solicitor for appellants: *J. E. Lambert.*

Solicitors for respondents: *Bramall & Bramall.*

(1) L. R. 4 I.A. 166, 176.

(2) 23 Cal. W. N. 534.

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MIDNAPUR ZAMINDARY COMPANY, }
LIMITED (PLAINTIFFS) } APPELLANTS;
AND
SECRETARY OF STATE FOR INDIA IN }
COUNCIL (DEFENDANT No. 1) . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Bengal Tenancy—Record-of-Rights—Entry as Tenure-Holder—Claim to be Occupancy Raiyat—Limitation—Jurisdiction in second Appeal—Settlement Record under Reg. VII. of 1822—Evidence as to Nature of Holding—Indian Limitation Act (IX. of 1908), Sch. I., art. 120—Code of Civil Procedure (V. of 1908), ss. 100, 101—Bengal Tenancy Act (VIII. of 1885) ss. 104H, 111A.

Under the proviso to s. 111A of the Bengal Tenancy Act, 1885, a person entered as a tenure-holder in a record-of-rights prepared under that Act can maintain a civil suit for a declaration that he is an occupancy raiyat; the period of limitation for the suit is not governed by s. 104H of the above Act, but by the Indian Limitation Act, 1908, Sch. I., art. 120, and consequently is six years from the publication of the record-of-rights.

Promoda Nath Roy v. Asiruddin Mandal (1911) 15 Cal. W. N. 896 and *Kumeda Prosunna Bhuiya v. Secretary of State* (1914) 19 Cal. W. N. 1017 approved.

If in a suit of the above nature a District Judge has found on appeal that the plaintiff is an occupancy raiyat, there being evidence to support that finding, and no reason for supposing that he did not give proper weight to the presumptions under s. 5, sub-s. 5, and s. 103B of the Act of 1885, the Code of Civil Procedure, 1908, ss. 100, 101, makes his finding binding in second appeal.

Durga Choudhrain v. Jawahir Singh Choudhri (1890) L. R. 17 I.A. 122 followed.

Although settlement records prepared under Reg. VII. of 1822 may not have the same evidentiary value as settlement records prepared under the Bengal Tenancy Act, 1885, they are evidence against the Government as to the nature of the holding.

Judgment of the High Court reversed.

APPEAL (No. 11 of 1926) from a decree of the High Court (August 4, 1924) reversing a decree of the District Judge of Murshidabad (December 9, 1921) which reversed a decree of the Subordinate Judge of Murshidabad.

* Present: LORD CARSON, SIR GEORGE LOWNDES, and SIR BINOD MITTER,

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The suit was brought by the appellants on June 29, 1917, for declarations (a) that the company was an occupaney raiyat not a tenure-holder of Char Narainpur, and (b) that the entry in the record-of-rights prepared under the Bengal Tenancy Act, 1885, that the company was a tenure-holder of the lands was a nullity. The record-of-rights in question had been published in 1915, and the land in suit was about 800 bighas in area.

In addition to the respondent, who alone contested the suit, there were joined as defendants the zamindar and all persons claiming to hold as tenants of the land in suit.

The facts of the case and the issues framed appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit. He was of opinion that the plaintiffs' predecessors, the Menasakkans, had first acquired the land in 1841 under an ijara from Government as rent collectors, and that consequently, having regard to s. 5 of the Act, they were tenure-holders even if they cultivated the land themselves after the termination of the ijara. He held also that the suit was under s. 104H, and was consequently barred by sub-s. 2.

An appeal to the District Judge was allowed. He found that the Menasakkans had acquired and used the land for the purpose of cultivation before the ijara of 1841, and that they were occupaney tenants. He made a decree so declaring, but considered that he was precluded by authority from declaring that the entry in the record was a nullity.

Upon a second appeal to the High Court (Sanderson C.J. and Chotzner J.) the decree of the Subordinate Judge was restored. The learned Chief Justice, who delivered the judgment, was of opinion that the view that the Menasakkans had been in possession before 1841 was merely speculative, and that there was no evidence to displace the presumption that the entry in the record-of-rights was correct.

1929. June 20, 24, 25, 27. *De Gruyther K. C. and E. B. Raikes* for the appellants. Under the Code of Civil Procedure, 1908, ss. 100, 101, the District Judge's finding that the plaintiffs

J. C. were occupancy raiyats was binding upon the High Court :
 1929 *Durga Choudhrain v. Jawahir Singh Choudhri.* (1) There
 — was evidence to support the finding, more particularly the
 MIDNAPUR rubokaris included in the settlement record of 1880 made
 ZAMINDARY CO. under Reg. VII. of 1822. The suit was maintainable under
 v. SECRETARY the proviso to s. 111A of the Bengal Tenancy Act, and was
 OF STATE not barred; s. 104H did not apply to it: *Promoda Nath Roy*
 FOR *v. Asruddin Mandal* (2); *Kumeda Prosunna Bhuiya v.*
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Dunne K.C. and *Kenworthy Brown* for the respondent. Under s. 103B of the Bengal Tenancy Act, 1885, the entry in the record-of-rights was to be presumed to be correct. The onus of displacing that presumption was not discharged; the evidence really supported the presumption. The finding of the District Judge was not binding in second appeal, as he gave no weight to the presumption under s. 103B, and there was no evidence whatever that the Menasakkans had cultivated the land before they became ijaradars. It was a question of construction whether the settlement record made under Reg. VII. of 1822 showed that the plaintiffs were raiyats. The fact that in 1880 the plaintiffs were recorded as raiyats without any proof that there was then any dispute as to their status did not displace the presumption under s. 103B: *Secretary of State v. Gobind Prashad Barik.* (4) Further, the suit was under s. 104H, sub-s. 3 (e), and was barred by s. 104H, sub-s. 2. The proviso to s. 111A merely preserves the right to bring civil suits given by s. 104H. If the present suit is under s. 111A and not under s. 104H, sub-s. 3 (e), the latter clause was not needed. The decisions relied on to the contrary were wrongly decided.

July 29. The judgment of their Lordships was delivered by

SIR BINOD MITTER. This is an appeal from the judgment and decree of the High Court of Judicature at Fort William in Bengal dated August 4, 1924, which reversed the decree

(1) (1890) L. R. 17 I. A. 122, 127. (3) (1914) 19 Cal. W. N. 1017.
 (2) (1911) 15 Cal. W. N. 896. (4) (1916) 2 Cal. W. N. 505.

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of December 9, 1921, and restored the decree of the Subordinate Judge of Murshidabad dated March 28, 1919.

The questions for determination in the suit out of which the present appeal arises were whether the appellants are raiyats or tenure-holders of a certain holding in Char Narainpur consisting of about 800 bighas, (2.) whether the suit comes within the purview of s. 104H or the proviso to s. 111A of the Bengal Tenancy Act, and (3.) whether the suit is within time having regard to the law of limitation under s. 104H of the same Act.

The Subordinate Judge held that the appellants had not proved that the entry in the record-of-rights finally published on April 2, 1915, to the effect that the appellants are tenure-holders is incorrect; he further held that the plaintiffs' suit was not maintainable under the provisions of s. 111A, and that it was barred under s. 104H, as it was not brought within six months from the date of the certificate of the final publication of the record-of-rights.

From the decision of the Subordinate Judge there was an appeal to the District Judge of Murshidabad, who held that the appellants were occupancy raiyats and not tenure-holders, and he further held that the suit was maintainable under s. 111A and was not barred by limitation.

From this decision there was a second appeal to the High Court and that Court held that there was no reliable evidence to justify the District Judge's conclusion that the original purpose for which the tenancy was created was for cultivation.

The High Court further held, that the onus of showing that the entry in the record-of-rights is not correct, was upon the appellants and that there was no evidence to justify the finding that they have discharged the onus. The High Court did not decide any other points involved in the case.

Their Lordships have to observe at the outset that no second appeal lies on the ground that the District Judge came to an erroneous finding of fact. The only question which the High Court could consider was whether the District Judge

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had before him any evidence proper for his consideration in support of his finding. Sect. 100 of the Code of Civil Procedure, being Act No. V. of 1908, corresponds with s. 584 of the Civil Procedure Code of 1882. The construction of s. 584 of the Civil Procedure Code of 1882 has often been considered by the Board. In *Durga Choudhrain v. Jowahir Singh Choudhri* (1) the Board said: "It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

In *Anangamanjari Chowdhhrani v. Tripura Soondari Chowdhhrani* (2) the Board laid down the law to the same effect: "It was in the opinion of their Lordships within their jurisdiction" (that is to say within the jurisdiction of the judges on a second appeal) "to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the judge."

The learned District Judge in his judgment held (1.) that the holding in question was acquired for the purpose of cultivation of indigo by hired labour; (2.) that the ijara of 1840 could not be rightly regarded as the origin of the holding, and that the origin was unknown, and from these findings of fact, he came to the conclusion that the entry in the record-of-rights was wrong and that the appellants were occupancy raiyats.

It seems to their Lordships that the real test, whether a holding is a tenure or raiyati, depends upon the purpose for which the holding was acquired.

The respondent relied on s. 103B, cl. 3, and s. 5, cl. 5, of the Bengal Tenancy Act. Their Lordships have no reason to doubt that the learned District Judge in coming to his findings of fact gave to the entry in the record-of-rights the proper weight to which it is entitled under s. 103B. He has expressly referred to the statutory presumption under s. 5, sub-s. 5. If he had evidence proper for his findings notwithstanding the statutory presumptions then it seems to their Lordships that his findings of fact were final and conclusive: see *Kumeda Prosunna Bhuiya v. Secretary of State*.⁽¹⁾

Their Lordships will now consider whether there was before the learned District Judge evidence proper for his finding.

It appears that the Menasakkans to whom the holding originally belonged conveyed their interest in 1873 to Jagendra Roy and others who in their turn sold in 1887 to Messrs. Louis Payen & Co. Louis Payen & Co. sold their interest in the holding to the appellants in 1913. It is a fact worthy of consideration, that in the present suit the zamindars or proprietors under whom the appellants hold and also the sub-tenants under them, admitted that the appellants are occupancy raiyats. It appears from the final settlement report of 1890 that occupancy holdings in the mehal in which Char Narainpur is situate are by local custom transferable. Char Narainpur has been assessed to revenue from time to time by the Government. The appellants drew their Lordships' attention to the rubokaris of March 27 1851, February 23, 1861, and March 15, 1871, and the other papers prepared for purposes of such settlements. These settlements were for ten years respectively. The settlement of 1871 expired on March 31, 1880, but was extended to March 31, 1890. From these settlement records including the rubokaris it appears that the only tenants cultivating the land were Baldav Saha, Ram Prasad and Beni Prasad Hazari (who were also the zamindars of the mauza) and the Menasakkans. The zamindars were growing dofasli crops, and the Menasakkans were cultivating indigo. These

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settlement records were prepared under Reg. VII. of 1882, and although they may not have the same evidentiary value as the settlement records prepared under the Bengal Tenancy Act, still in their Lordships' opinion they are evidence against the Secretary of State for India in Council.

Mr. De Gruyther has drawn their Lordships' attention also to certain ekrars executed by the tenants in favour of Louis Payen & Co., as also to the account books ranging from 1887 to 1901. These account books show clearly that at any rate indigo was being cultivated on a portion of the land in question by Louis Payen & Co. through hired labourers.

Suits had been instituted upon the ekrars, given by the various jotedars or tenants under Louis Payen & Co. and the tenants contested these suits, on the allegation that these ekrars in which Louis Payen & Co. were acknowledged to be occupancy raiyats were taken by force, but these ekrars were held to be valid.

It is not necessary to go into further detail as regards the evidence, but their Lordships are satisfied after a careful examination of the record, that there was evidence before the learned District Judge proper for his finding. The learned District Judge did not discuss in detail the various settlement records and other evidence, oral and documentary, to which their Lordships' attention has been drawn, but their Lordships have no reason to doubt that the learned District Judge fully considered them.

Having regard to the practice of the High Court in second appeals it seems probable that the full record of the case which was laid before their Lordships was not placed before the learned judges of the High Court.

The two other points that their Lordships have to decide are whether the suit is maintainable and whether the same is barred by limitation. The identical points came up for decision in the case of *Raja Promoda Nath Roy v. Asiruddin Mandal* (1), and the High Court decided that a suit like the present would come within the proviso to s. 111A of the Bengal Tenancy Act, and that the period of limitation applicable to

such suits was that provided by art. 120 of Sch. I. of the Indian Limitation Act. Their Lordships concur in this decision and the reasons given in its support by Chatterjee J.

For the reasons aforesaid, their Lordships are of opinion that the appeal should be allowed, the decree of the High Court set aside, and the decree of the District Court restored, with costs in all the Courts, and they will humbly advise His Majesty accordingly.

The respondent will pay the costs of this appeal.

Solicitors for appellants: *Burton, Yeates & Hart.*

Solicitor for respondent: *Solicitor, India Office.*

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A thikadar registered under the United Provinces Land Revenue Act, 1901, purported to transfer his thika to his son and grandson, who applied for mutation of names. The superior proprietor, being given notice, objected that the thika had been forfeited by the transfer, and that the transferees were merely tenants. The Assistant Collector upheld that contention. The transferor thereupon brought a civil suit against the transferees and obtained by consent a decree that the gift was incomplete and passed no title. He then appealed in the mutation proceedings, and eventually the Board of Revenue ordered therein that the transferor should be re-entered as thikadar. The superior proprietor appealed to the Privy Council:—

Held, that the appeal did not lie. A thikadar being a "proprietor" within the meaning of s. 32 of the Act above mentioned, the dispute was one as to an entry in the register maintained under s. 32 (a), and while by s. 44 the decision did not bar a civil suit, no appeal to the Privy Council was given. The dispute not being under s. 32 (e) it was not necessary to decide whether s. 42, which provides that the Code of Civil Procedure shall apply to the trial of particular disputes within s. 32 (e), had in those disputes the effect of giving a right of appeal under the Code. **UDIT NARAYAN SINGH v. MUBARAK ALI** 86

ARBITRATION—Limitation—Arbitration after invalid Award—Indian Limitation Act (IX. of 1908), s. 14; Sch. I., art. 115.

In a reference to arbitration it is an implied term of the contract that the arbitrators must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law, including limitation, can be raised unless that defence has been excluded by agreement of the parties.

In applying to an arbitration the Indian Limitation Act, 1908, Sch. I., art. 115, which limits the time for commencing "a suit" for compensation for breach of contract, effect should be given by analogy to s. 14 of that Act, so as to exclude the time occupied by the plaintiff, acting bona fide and with diligence, in obtaining a previous award on the same cause of action, and in resisting a suit which, after an appeal to the Privy Council, resulted in the award being set aside for want of jurisdiction in the arbitrator.

In re Astley and Tyldesley Coal and Salt Co. (1899) 68 L. J. (Q. B.) 252 approved. **RAMDUTT RAMKISSENDASS v. F. D. SASSOON & Co.** 128

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BENGAL TENANCY—Civil Suit after application to Revenue Court—Application withdrawn by Leave—Whether Suit maintainable—Bengal Tenancy Act (VIII. of 1885), ss. 105, 106, 109.

Sect. 109 of the Bengal Tenancy Act, 1885, prohibits a civil suit in any matter which is or has been the subject of an application under s. 105 to s. 108, even if the application has been withdrawn, whether with or without the leave of the Court.

Purna Chandra Chatterjee v. Narendra Nath Chowdhury (1925) I. L. R. 52 C. 894 (F. B.) approved.

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Under the proviso to s. 111A of the Bengal Tenancy Act, 1885, a person entered as a tenure-holder in a record-of-rights prepared under that Act can maintain a civil suit for a declaration that he is an occupancy raiyat; the period of limitation for the suit is not governed by s. 104H of the above Act, but by the Indian Limitation Act, 1908, Sch. I., art. 120, and consequently is six years from the publication of the record of rights.

Promoda Nath Roy v. Asiruddin Mandal (1911) 15 Cal. W. N. 896 and *Kumeda Prosunna Bhuiya v. Secretary of State* (1914) 19 Cal. W. N. 1017 approved.

If in a suit of the above nature a District Judge has found on appeal that the plaintiff is an occupancy raiyat, there being evidence to support that finding, and no reason for supposing that he did not give proper weight to the presumptions under s. 5, sub-s. 5 and s. 103B of the Act of 1885 the Code of Civil Procedure, 1908, ss. 100, 101, makes his finding binding in second appeal.

Durga Choudhury v. Jawahir Singh Choudhury (1890) L. R. 17 I. A. 122 followed.

Although settlement records prepared under Reg. VII. of 1822 may not have the same evidentiary value as settlement records prepared under the Bengal Tenancy Act, 1885, they are evidence against the Government as to the nature of the holding. **MIDNAPUR ZAMINDARY Co. v. SECRETARY OF STATE FOR INDIA** 388

3. — Sale for Arrears of Rent—Annulment of Incumbrances—Separate Tenures included in one Suit—Rights of Holder of Sub-tenure—Sub-tenure held by Judgment-debtor—Bengal Tenancy Act (VIII. of 1885), ss. 167, 170.

A sub-tenure created by the holder of a tenure under the Bengal Tenancy Act, 1885,

BENGAL TENANCY—continued.

cannot validly be annulled under s. 167 by a purchaser at a sale in execution of a decree for rent unless the tenure has been attached and sold separately from any other tenure, so that the sub-tenure holder can redeem it pursuant to s. 170. But if the judgment-debtor himself holds a sub-tenure and has not objected that the execution proceedings have treated separate tenures jointly, neither he nor those claiming from him can complain of an annulment of that sub-tenure.

The Code of Civil Procedure permits a plaintiff to join in one suit claims against a defendant in respect of more than one tenure, and there appears to be nothing in the Code or in the Bengal Tenancy Act to prevent the resulting decree from being moulded so as to apply distributively to the separate tenures; but it was not necessary so to decide, as it did not appear in the present case that there had been separate execution proceedings in respect of the separate tenures. *PRAFULLA NATH TAGORE v. SATYA BHUSAN DAS* . . . 238

CONVERSION—Conversion without dishonesty—Limitation.

See **LIMITATION** 1.

CASES :—

- *Bhagwat Singh v. Nazir Husain*, 5 Oudh Cases, 395.
Approved: See **PRE-EMPTION** 2.
- *Chidambara Sivaprakasa v. Veerama Reddi*, 47 I. A. 76.
Distinguished: See **MADRAS TENANCY** 3.
- *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee*, 8 C. 678.
Approved: See **PARTNERSHIP**.
- *Chunder Poramanick v. Ramdhone Bhattacharjee*, 6 S. W. R. 228.
Applied: See **LAND ACQUISITION** 1.
- *Doe v. Harlow*, 12 Ad. & E. 40. Distinguished:
See **LIMITATION** 1.
- *Durga Choudhrain v. Jawahir Singh Choudhri*, 17 I. A. 122.
Followed: See **BENGAL TENANCY** 2.
- *Hurrinath Chatterji v. Mothoor Mohun*, 20 I. A. 183.
Followed: See **LIMITATION** 5.
- *Irrawaddy Flotilla Co. v. Bhugwandas*, 18 I. A. 121.
Applied: See **PARTNERSHIP**.
- *Jagdeo Narain Singh v. Baldeo Singh*, 49 I. A. 399, 407.
Explained: See **SALE FOR REVENUE**.
- *Jalim Chand Patwari v. Yusuf Choudhuri*, 54 C. 143.
Approved: See **EXECUTION OF DECREE**.
- *Johnston v. Orr-Ewing*, 7 App. Cas. 219.
Applied: See **TRADE MARK**.

CASES—continued.

- *Joti Prasad v. Srichand*, 26 All. L. J. 966.
Approved: See **EXECUTION OF DECREE**.
- *Kumeda Prosunna Bhuiya v. Secretary of State*, 19 C. W. N. 1017.
Approved: See **BENGAL TENANCY** 2.
- *Lee v. Alexander*, 8 App. Cas. 853, 868.
Followed: See **LAND REVENUE**.
- *Lodna Colliery Co. v. Bipin Behari Bose*, 55 I. C. 113.
Approved: See **LIMITATION** 1.
- *Moro Vishvanath v. Ganesh*, 10 Bom. H. C. 444, 453.
Applied: See **HINDU LAW** 1.
- *Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan*, 24 C. W. N. 321 (P. C.).
Distinguished: See **SALE FOR REVENUE**.
- *Mujibunnissa v. Abdul Rahim*, 28 I. A. 15.
Distinguished: See **REGISTRATION** 2.
- *Musahar Sahu v. Hakim Lal*, 43 I. A. 104.
Followed: See **REGISTRATION** 2.
- *Pandurang v. Jagya*, 45 B. 91.
Approved: See **EXECUTION OF DECREE**.
- *Pirthee Singh v. Raj Kower*, I. A. Supp. 203.
Followed: See **HINDU LAW** 4.
- *Promoda Nath Roy v. Asiruddin Mandal*, 15 C. W. N. 896.
Approved: See **BENGAL TENANCY** 2.
- *Purna Chandra Chatterjee v. Narendra Nath Chowdhury*, 52 C. 894 (F. B.).
Approved: See **BENGAL TENANCY** 1.
- *Ramling Parwatayya v. Bhagwant Sambhuappa*, 50 B. 334.
Approved: See **REGISTRATION** 3.
- *Reference under s. 57 of Act II. of 1899*, 23 A. 213.
Disapproved: See **REGISTRATION** 2.
- *Rhodes v. Rhodes*, 7 App. Cas. 192.
Applied: See **PROBATE**.
- *Runchordas v. Parratibhai*, 26 I. A. 71.
Followed: See **LIMITATION** 5.
- *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri*, 49 C. 507.
Approved: See **REGISTRATION** 3.
- *Sarada Nath Bhattacharya v. Gobindra Chandra Das*, 23 C. W. N. 534.
Approved: See **REGISTRATION** 2.
- *Satyanarayana v. Chinna Venkata Rao*, 49 M. 302.
Approved: See **REGISTRATION** 3.
- *Sashi Bhushan Misra v. Jyoti Prashad Singh*, 44 I. A. 46.
Followed: See **MINERALS**.
- *Seturatnam Aiyar v. Venkatachala Gounden*, 47 I. A. 76.
See **MADRAS TENANCY** 3.

CASES—continued.

— *Surja Kanta Acharjya v. Sarat Chandra Roy Chowdhuri*, 18 C. W. N. 1281 (P. C.).
Followed: *See SALE FOR REVENUE.*

— *Tyrrell v. Painton* [1894] P. 151.
Applied: *See PROBATE.*

— *Venkata Sastrulu v. Sitaramudu*, 38 M. 391, 392.
Observation approved: *See MADRAS TENANCY 1.*

— *Williams v. Hensman*, 1 J. & H. 546, 557.
Followed: *See EVIDENCE 1.*

— *Yarlagada Mallikarjuna v. Subbiah*, 39 Mad. L. J. 277. Distinguished: *See MADRAS TENANCY 2.*

COURT FEES—*Suit for Accounts—Appeal—Cross-claims—Value of Relief sought—Discretion of Court where Valuation insufficient—Code of Civil Procedure Act (V. of 1908), s. 149—Court Fees Act (VII. of 1870), s. 7 (iv.) (f).*

On taking accounts in a partnership suit a decree was made that Rs.19,991 were due from the plaintiffs to the first defendant. The plaintiffs, who had valued their suit at Rs.3000, appealed within the time limited, praying that the decree be set aside and that a decree be made for such an amount as might be found due to them. By their memorandum of appeal they valued the appeal at Rs.19,991, and paid Court fees accordingly. The Appellate Court remanded the matter for a retrial, but ordered that the plaintiffs should not have a decree for any sum which might be found due to them since in their view the Court fees paid did not cover that relief, and to that extent the appeal was then barred by limitation:—

Held, that the memorandum of appeal correctly stated “the amount at which relief is sought,” within the Court Fees Act, 1870, s. 7 (iv.) (f), and the fees paid entitled the plaintiffs to claim a decree if any sum should be found to be due to them; but that even if that was not so the Appellate Court should have exercised its power under the Code of Civil Procedure, 1908, s. 149, to allow a further payment, and should not have precluded the plaintiffs from the full relief which they sought. *FAIZULLAH KHAN v MAULADAD KHAN* 232

DAMAGES—*Suit for passing off.*
See TRADE MARK.

ESTOPPEL—*Party to partition claiming land decreed to another party—Purchase on sale in Execution.*
See SALE FOR REVENUE.

EVIDENCE—*Admissibility—Conveyance to Persons as joint Tenants—Parol Evidence to prove Severance—Evidence Ordinance (Straits*

EVIDENCE—continued.

Settlements Laws, 1926, No. 53), s. 92—*Indian Evidence Act (I. of 1872)*, s. 92.

When property has been conveyed to persons as joint tenants there may be a severance of the joint tenancy by any course of dealing sufficient to intimate that the interests of all of them were mutually treated as constituting a tenancy in common.

Parol evidence to prove a severance is not excluded by s. 92 of the Evidence Ordinance of the Straits Settlements (which is in the same terms as s. 92 of the Indian Evidence Act, 1872), since the evidence does not contradict or vary the terms of the conveyance.

In the present case the Judicial Committee held that evidence relied on to establish a severance was insufficient for that purpose.

Williams v. Hensman (1861) 1 J. & H. 546, 557 followed. *TAN CHEW HOE NEO v. CHEE SWEE CHENG* 112

2. — *Documents not produced at first Hearing—Discretion of Court to admit Documents—Official Records which may assist Court—Relation of Landlord and Tenant—Construction of Decree—“Jotedar”—Code of Civil Procedure (Act V. of 1908), Order XIII., r. 1, 2.*

Where a party has not produced at the first hearing, as required by Order XIII., r. 1, the documents in his possession or power on which he relies, the leave of the Court under r. 2 admitting them at a later stage should not ordinarily be refused if the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it.

In a suit of 1854 a zamindar obtained a decree for possession, with mesne profits, of lands forming part of his estate; the decree ordered that “as long as the defendants are ready and willing to pay rents legally according to the rates prevailing in the village they should not be ousted from their rights as jotedars.” The defendants and their successors remained in possession without paying rent:—

Held, that the decree did not constitute the relation of landlord and tenant between the zamindar and the then defendants (predecessors of the present parties), but merely entitled them to the rights of jotedars (whatever those rights may have been at the date of the decree) if they were ready and willing to pay rent.

The further circumstances of the present case (even after admitting evidence excluded in India under Order XIII.) not establishing the relation of landlord and tenants between the present parties, the Indian Limitation Act, 1908, Sch. I., art. 139, did not apply, and the appellant's suit was barred by art. 144. *GOPIKA RAMAN ROY v. ATAL SINGH* 119

— *Grant, construction of—Antecedent correspondence.*
See LAND REVENUE.

EVIDENCE—continued.

—Grant, terms of—Secondary evidence—Copy over thirty years old—Authentication.
See MADRAS TENANCY 1.

—Possession—Order to pay mesne profits.
See LIMITATION 2.

—Thak statements.
See SALE FOR REVENUE.

EXECUTION OF DECREE—Decree-holder certifying Payments—Limitation—“Application”—Certification when Execution barred but for Payments certified—Indian Limitation Act (IX. of 1908), Sch. I., art. 181—Code of Civil Procedure (Act V. of 1908), Order XXI, r. 2 (1.).

Certification to the Court under Order XXI, r. 2 (1.), by a decree-holder of a payment made to him out of Court, even if made in the form of an application, is not an “application” within art. 181 of the Limitation Act so as to be barred unless it takes place within three years of the payment certified; nor is there any article which limits the time. Further, certification under r. 2 (1.), can take place when execution of the decree is barred but for the payment certified.

Pandurang v. Jagya (1920) I.L.R. 45 B. 91; *Jalim Chand Patwari v. Yusuf Chowdhuri* (1924) I.L.R. 54 C. 143; and *Joti Prasad v. Srichand* (1928) 26 All.L.J. 966 approved.

Judgment of the Chief Court affirmed.
PRAKASH SINGH v. ALLAHABAD BANK, LD. 30
HINDU LAW—Partition—Presumption that Family continues Joint—Effect of Lapse of Time—Presumption rebutted by Facts—Exclusion from Joint Family—Indian Limitation Act (IX. of 1908), Sch. I, art. 127.

The strength of the presumption that a Hindu joint family continues to be joint necessarily varies in each case. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family the presumption becomes weaker and weaker.

In 1917 the respondent sued the appellants alleging that he was joint with them, and claiming a partition of police service lands in their joint possession. The respondent was a distant kinsman of the appellants, his great-great-grandfather being the common ancestor; he did not reside, worship, or mess with them. The appellants' branch had been in exclusive possession of the lands, paying the judi thereon, since 1862, when a claim to a joint interest had been resisted and no suit brought. Upon the death of the patil in 1882 there was no member of the appellants' branch available to fill the office, and the respondent was appointed at the widow's request. He had then alleged that he had a joint interest; but in 1895, when the first appellant, having

then attained majority, was appointed to

HINDU LAW—continued.

supersede him, he raised no objection or claim:—

Held, that having regard to the facts the presumption did not justify a finding that the respondent was a member of the joint family; further, that the facts also showed an exclusion to the knowledge of the respondent for over twelve years so as to bar the suit under the Indian Limitation Act, 1908, Sch. I., art. 127.

Moro Vishwanath v. Ganesh (1865) 10 Bom.H.C. 444, 453 applied.

Judgment of the High Court reversed.
YELLAPPA RAMAPPA v. TIPPANNA 13

2.—Partition—Property of Person outside joint Family—Alleged Agreement to treat Property as Joint—Purchases out of combined Properties—Onus of Proof.

Three brothers formed a joint Hindu family. A sister married a Christian who was in better circumstances than they were. He died in 1887 leaving a son (the appellant) then four years old. The appellant with his mother then went to live with his uncles, and from that time the uncles treated the property which the appellant inherited from his father, and the produce of it, in the same way as their own family property. In 1906 an outstanding half share in the ancestral property of the appellant's father was bought in the name of the appellant out of the produce of the combined properties, which was also applied from time to time to the purchase of other properties. In 1917 one of the three brothers sued for partition claiming a fourth share of the whole combined property. The suit was decreed on the ground that there was an implied agreement between the parties to share all the properties equally:—

Held, that the plaintiff was not entitled to share either in the property which the appellant inherited, or in that bought in his name. As to the former property the onus was upon the plaintiff to prove that he was entitled to share in it, and he had not discharged that onus. Any presumption arising by reason of the source of the money with which the latter property was bought was rebutted by the circumstances. *JOGI REDDI v. CHINNABBI REDDI* 6

—Limitation—Exclusion from joint family.

See LIMITATION 3.

3.—Religious Endowment—Math including several Asthals—Division of Mahantship—Conflicting Wills of Mahant.

In 1908 the mahant of a math, which included a greater and five lesser asthals, executed a will appointing the first respondent his chief chela and to succeed him as gaddinishin mahant. In 1918 he executed two wills on the same day. By the first he named the first respondent to succeed him

HINDU LAW—continued.

as mahant of one of the lesser asthals, and bequeathed to him the income thereof, also some land attached to another lesser asthal. By the second will, after stating the effect of the first, he bequeathed to another chela all the rest of the math property, and appointed him to succeed as gaddinishin mahant. The testator died shortly after. The two chelas then compromised disputes by giving effect to the two wills of 1918. In 1920 the new gaddinishin mahant died, having by his will appointed the appellant to succeed him. The first respondent sued to establish his right to be gaddinishin mahant and to possession of the whole property of the math. Both Courts rejected his claim to succeed as being senior chela, but the High Court held that the wills of 1918 were ultra vires, as an attempt to divide the asthals, and that he succeeded under the will of 1908:—

Held, that the wills of 1918 should be treated as separate documents, and that the appellant was entitled to be gaddinishin mahant under the definite appointment in the second will, whether or not the reservation of the lesser mahantship (which the appellant did not claim) was valid.

Sembler, that when the usage in a math consisting of several asthals has been to have only one mahant, a separation of the office is improper unless there are special circumstances justifying it.

Decree of the High Court I.L.R. 52 C. 748 reversed. RAM CHARAN RAMANUJ DAS v. GOBINDA RAMANUJ DAS 104

—Reversioner—Adverse possession against widow.

See LIMITATION 5.

4.—*Widow's Maintenance—Arrears of Maintenance—Widow residing in parental Home.*

A Hindu widow who has left the residence of her deceased husband, not for unchaste purposes, and resides with her father is entitled to maintenance, also to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence.

The maintenance should be such an amount as will enable the widow to live, consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house, unless there are circumstances which affected, one way or the other, her mode of living there.

The Judicial Committee is extremely reluctant to interfere with the amount of a decree for maintenance unless there has been some miscarriage in the way the amount has been arrived at.

Pirthee Singh v. Raj Kower (1873) L.R. I.A. Supp. 203 followed. EKRADESHWARI v. HOMESHWAR SINGH 182

HINDU WILL—Bequest of absolute Estate subject to Restrictions—Limitation purporting to entail Estate—Paramount Intention of Testator—Indian Succession Act (X. of 1865), ss. 74, 82.

The will of a Hindu taluqdar who died without issue provided that "subject to some provisions and restrictions given below," his entire estate should on his death "vest in" P., the third son of his nephew, who "shall be my heir and successor." Provisions and restrictions followed to the effect that the estate was to pass on P.'s death to his successors, and that he and they were to be bound to adhere to the Hindu religion and were not to have the power to alienate, the succession to be according to the rule of primogeniture; and it was stated that the testator's sole wish was "that the estate may remain with the male heirs of his sombansi family." It was contended that the intention was to give P. and each of his successors a life interest, and that this limitation to the successors being invalid, the estate reverted on P.'s death to the heirs of the testator:—

Held, that the words in the earlier part of the will created an absolute estate of inheritance in P., and that the provisions and restrictions were an attempt to impose repugnant conditions on the estate so created, and were therefore void. Applying ss. 74 and 82 of the Indian Succession Act, 1865, the paramount intention of the testator, as shown in the will, was to be ascertained, and in the present case it was to benefit P. and his branch of the family.

Decree of the High Court affirmed. RAGHUNATH PRASAD SINGH v. DEPUTY COMMISSIONER, PARTABGARH 372

JOINT TENANCY—Property conveyed to persons jointly—Severance.

See EVIDENCE 1.

JOINT TORTFEASORS.

See LIMITATION 1.; MESNE PROFITS.

JURISDICTION—Appeal from Board of Revenue.

See APPEAL TO PRIVY COUNCIL.

LAND ACQUISITION—Compensation—Buildings erected by Government before Notification—Land Acquisition Act (I. of 1894), s. 6.

The Government having resolved to acquire under the Land Acquisition Act, 1894, land belonging to the appellant, took possession by arrangement with sutidars, who occupied part of the land, and erected buildings partly on land occupied by the appellant and partly on land occupied by the sutidars. Only after doing so the Government notified a declaration under s. 6 of the Act that the land was required for a public purpose. The appellant was awarded under the Act the value of the land, and interest thereon from the date when possession had been taken:—

Held, that the appellant was not entitled to the value of the buildings, since by the

LAND ACQUISITION—continued.

law of India they did not form part of the soil, and even if the appellant would have been entitled to compensation for them if the Government had acted as mere trespassers and without colour of title, the Government had not so acted.

It was not necessary to decide whether the appellant could have recovered compensation in respect of a right to have the buildings removed, as he had not so claimed in India.

Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee (1866) 6 S.W.R. 228 applied. *VALLABHDAS NARANJI v. DEVELOPMENT OFFICER, BANDRA* 259

2.—*Declaration of intended Acquisition*—*Later Declaration cancelling first Declaration*—*Land referred to in both Declarations*—*Date at which Compensation to be Calculable*—*Land Acquisition Act (I. of 1894)*, ss. 6,23.

The local Government published under s. 6 of the Land Acquisition Act, 1894, a declaration that land belonging to the appellants respectively and land belonging to other persons were required for public purposes. Five months later the Government published another declaration for the acquisition of the appellants' lands only; the declaration stated that the earlier declaration was thereby cancelled:—

Held, that having regard to s. 23, sub-s. 1, of the Land Acquisition Act, 1894, the compensation should have been based upon the value of the land at the date of the publication of the later declaration.

Decree of the High Court reversed.
MA SIN v. COLLECTOR OF RANGOON 210
LAND REVENUE—*Grant of Villages partly occupied by permanent Tenants*—*Non-agricultural Assessment imposed after Grant*—*Rights of Grantee to Assessments*—*Construction of Grant*—*Antecedent Correspondence*—*Admissibility*—*Land Revenue Code (Bom. Act V. of 1879)*, s. 48, sub-s. 2.

A grant in 1848 by the Bombay Government to the first appellant's ancestor, after reciting that the grantee had prayed that a Government grant of Rs.4000 per annum which he enjoyed might be exchanged for a grant of villages in Salsette Island, stated that two named villages "are hereby assigned to you and your heirs in perpetuity." The boundaries and other particulars of the land followed, with a detailed statement of the land revenue paid by sutidars (occupant owners) amounting to Rs.4679; from this was deducted "the amount of your inam," Rs.4000, leaving a difference "payable by you annually Rs.679." It was further provided that if the grantee brought into cultivation land not then assessed he would, after a certain period, be liable to assessment thereon; that in case of the land assessment being increased, or any other modification of the revenue system being introduced, by the Government, "the same shall have operation within the villages hereby granted

LAND REVENUE—continued.

to you"; and (condition 20) that the deed conferred "no right which the Government does not now possess, and only such portion of the right of Government as may be herein specifically granted is hereby granted to you." In 1917 the Government imposed on lands in one of the villages non-agricultural assessments under the Bombay Land Revenue Code, 1879, s. 48, sub-s. 2, and rules made in 1907 under s. 214 of that Act. The appellants sued, claiming that they were entitled to have the amount of the non-agricultural assessment, in whole or in part, credited to them. It was common ground that the village was an "alienated village" as defined in s. 3 of the Code. The High Court dismissed a claim by the grantees' successors to the non-agricultural assessment imposed on the land occupied by sutidars:—

Held, (1.) that the grant of 1848 was not merely an assignment of Rs.4000 per annum out of the revenues of the villages, but was a grant of the villages subject to the conditions attached.

(2.) That as by s. 48, sub-s. 2, of the Land Revenue Code, the non-agricultural assessments were merely in substitution for the former assessments, condition 20 did not apply, and the appellants were entitled to be credited with the amount so assessed upon the land occupied by the sutidars, it not being practicable to fix the appellants' share in the proportionate manner referred to in r. 5 of the revenue rules of 1907.

Held, further, that the trial judge had been in error in construing the deed in the light of the antecedent correspondence between the parties, it being well settled that even a formal antecedent contract cannot be looked at to control the terms of a conveyance.

Lee v. Alexander (1888) 8 App. Cas. 853, 868, per Lord Selborne, and other cases, applied.

Decree of the High Court reversed.
WADIA v. SECRETARY OF STATE FOR INDIA 51

LANDLORD AND TENANT—*Construction* of decree of 1854—"Jotedar." See EVIDENCE 2.

—*Lease of Oil Sites*—*Royalties payable on oil won*—*Lessor's Right to natural Gas*—*Construction of Lease*—*Transfer of Property Act (IV. of 1882)*, s. 108 (o).

The appellant, the owner of oil sites and grantee from Government of the right to win oil therefrom, leased the sites and the right to win oil for twenty-five years to the respondents, who agreed to pay royalties on oil won by them. In sinking wells, which did not produce oil in commercial quantities, the respondents found natural gas. They tapped the gas by pipes, and for six years used it for their own purposes:—

Held, that the appellant was not entitled to compensation for the gas so taken, since (1.) that right was not included in the right

LANDLORD AND TENANT.—*continued.*
to royalties upon the oil won; and (2.) the lease, on its true construction, was not merely a lease for the purpose of winning oil, and the appellant having no property in the gas, the respondents were entitled to reduce into possession and use it provided they did so without injury to the leased property: that view was not inconsistent with the Transfer of Property Act, s.108 (o).

It was not necessary to decide whether the Upper Burma Land and Revenue Regulation, s. 31, reserves to the Government the right to natural gas.

Decree of the High Court affirmed. U PO NAING v. BURMA OIL CO. 140

LIMITATION — Arbitration after invalid award—Indian Limitation Act (IX. of 1908), s. 14.

See ARBITRATION.

— *Conversion—Conversion without Dishonesty — Joint Tortfeasors — Assignment of Mining Lease—Coal raised outside demised Land—Royalties paid to Assignor — Suit against Assignor and Assignee — Indian Limitation Act (IX. of 1908), Sch. I., art. 48.*

In 1915 the appellant acquired a coal mining lease granted by a zamindar over a property called P., together with the benefit (if any) of a sanad by which the zamindar had agreed to lease an adjoining 20 bighas, part of property G., conditionally on that lease being executed within a time which had then expired. The appellant continued until January, 1917, encroachments already made in the 20 bighas, believing that he had a promise from the zamindar of an extension of the sanad. The zamindar had however leased G. in 1914 to the respondents. In September, 1917, the appellant, without notice of the lease of 1914, sublet P. for the whole of the residue of his term, with the benefit of the sanad. The sub-lessees agreed to pay royalties upon the demised premises, and he indemnified them against claims in respect of his encroachments. The sub-lessees continued the workings under the 20 bighas, and paid the appellant royalties upon the whole coal raised by them without distinguishing between that from P. and that from the 20 bighas. In June, 1920, the respondents sued the appellant and his sub-lessees for conversion of coal raised by the sub-lessees from the 20 bighas. Both Courts in India held the appellant jointly liable.

By the Indian Limitation Act, 1908, Sch. I., art. 48, the period of limitation for a suit "for specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same" is three years from the time when the plaintiff "first learns in whose possession" the property is. By art. 49 the period for a suit "for other specific movable property, or for compensation for wrongfully taking or injuring or wrongfully

LIMITATION—*continued.*

detaining the same" is three years from the date of the cause of action:—

Held, (1.) that art. 48 applied, as "conversion" in the article included all conversions, whether "dishonest" or not, and that accordingly no part of the claim was barred; but (2.) that the appellant was not liable, as there was no evidence constituting him a joint tortfeasor with the other defendants, who were in effect assignees of the lease to him.

Lodna Colliery Co. v. Bipin Behari Bose (1920) 55 Ind. Cases, 113 approved.

Doe v. Harlow (1840) 12 Ad. & E. 40 distinguished. *PUGH v. ASHUTOSH SEN* 93

2.—*Dispossession—Land emerging after Diluvion—Constructive Possession of Owner till Dispossession—Evidence of Possession by Others—Order for Mesne Profits—Indian Limitation Act (IX. of 1908), Sch. I., art. 142.*

In 1915 the High Court made a decree declaring the title of the plaintiffs to a plot of land which had emerged shortly before 1905 after many years' diluvion. A decree for possession was not made, the High Court finding that in 1908, when the suit was instituted, there had been no dispossession by the defendants. On June 23, 1917, the plaintiffs sued the same defendants for possession of the plot. The defendants contended that the suit was barred by the Indian Limitation Act, 1908, Sch. I., art. 142, as the plaintiffs had been dispossessed by third parties against whom, on June 27, 1905, the defendants had obtained an order for possession of the plot under a decree ejecting the third parties from a larger area. There was no direct evidence of possession of the plot by the third parties, but the defendants relied upon an order against them for mesne profits based upon the plot having been cultivable in 1904:—

Held, that the order for mesne profits was not evidence that the third parties cultivated or were in possession of the plot, and that the plaintiffs remained in constructive possession until dispossessed by the defendants which, by the decree of 1915, took place within twelve years of the present suit; the suit therefore was not barred by art. 142. *SATISH CHANDRA JOARDAR v. BIRENDRA NATH ROY* 305

3.—*Hindu Law (Partition)—Exclusion from Joint Family—Voluntary non-residence with Family—Maintenance and Education not contributed to—Absence of Intention to exclude—Indian Limitation Act (IX. of 1908), Sch. I., art. 127.*

In 1898 a member of a joint Hindu family, whose father and mother had both died and who was then twelve years of age, went to reside with his maternal uncle, and never afterwards returned to the joint family residence. The joint family did not contribute to the expenses of his maintenance, education, or marriage, nor were they asked to do so. He came of age in 1904 and not till 1920

LIMITATION—continued.

sued for partition. The defendants alleged, but failed to prove, that in 1906, and again in 1909, the plaintiff had demanded a share of the family property but had been definitely refused:—

Held, that the facts proved did not establish an intention to exclude the plaintiff from the joint family, and that the suit therefore was not barred by the Indian Limitation Act, 1908, Sch. I., art. 127. There was in 1909 a refusal by the defendants to partition at that time, but not a denial of the right; that was not an exclusion and moreover was within twelve years of the suit.

Decree of the High Court reversed.
RADHOBA BALOBA VAGH v. ABURAO BHAGWANTRAO SHIROLE 316

4. — *Mortgage—Reversioner's Suit to redeem—Transfer of Possession by Mortgagee—Indian Limitation Act (IX. of 1908), Sch. I., arts. 134, 140.*

When a mortgagee has transferred possession of the mortgaged property for a valuable consideration a suit to redeem by a plaintiff who at the date when the mortgagee transferred possession had a contingent interest in remainder in the property is governed by art. 140 and not by art. 134 of the Indian Limitation Act, 1908, Sch. I.; the suit consequently is not barred if it is brought within twelve years from the date when the plaintiff's estate falls into possession, even though it is brought more than twelve years after the date of the transfer under which the defendant claims.

Decree of the High Court I. L. R. 47 A. 803 reversed. **SKINNER v. NAUNIHAL SINGH 192**

5. — *Suit for Possession—Suit by reversionary Heir—Adverse Possession for twelve years at Widow's Death—Suit for Declaration during Widow's Life—Code of Civil Procedure (Act V. of 1908), Order II., r. 2—Indian Limitation Act (IX. of 1908), Sch. I., arts. 120, 141.*

A decree against a Hindu widow in relation to her deceased husband's property is binding upon the reversioners although it is founded upon limitation; but under the Indian Limitation Act, 1908, Sch. I., art. 141, a suit by the reversionary heir for possession of immovable property of the estate, as to which no decree has been made against the widow, is not barred by limitation if it is brought within twelve years of his estate falling into possession, even though the defendant has been in adverse possession for twelve years at the date of the death of the widow.

Hurrinath Chatterji v. Mothoor Mohun L. R. 20 I. A. 183 and Runchordas v. Parvatibhai L. R. 26 I. A. 71 followed.

The article of the above Act applicable to a suit for a declaration that a will is invalid so far as it purports to dispose of a malikana granted by Government is art. 120, and the right to sue does not accrue until the plaintiff

LIMITATION—continued.

has obtained a certificate under the Pensions Act, 1871; the suit therefore is not barred if brought within six years of obtaining the certificate.

A reversioner on the death of a Hindu widow who has sued during the widow's life for a declaration as to his rights is not barred by Order II., r. 2, from including in a suit brought after her death a claim which the Court was not competent to deal with in the previous suit owing to the absence of a certificate under the Pensions Act, 1871, or a claim to possession which he was not then entitled to. **JAGGO BAI v. UTSAVA LAL 267**

LIS PENDENS—Purchase of mortgaged property—Sum due under mortgage.
See **MARTGAGE 1.**

MADRAS TENANCY—Estate under Act of 1908—Shrotriyam Grant—Construction of Grant—Whether of Land-Revenue only—Grant by Despandyar to non-resident Brahmins—“Mauje”—Secondary Evidence of Grant—Copy more than thirty Years old—Authentication by Indorsement—Indian Evidence Act (I. of 1872), ss. 65, 90—Madras Estates Land Act (Mad. Act I. of 1908), s. 3, sub-s. 2 (d).

About 1689 an agraham village was granted as shrotriyam, the grant stating that “as we have granted the said agraham you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy.” The grant was by despandyars, revenue officers and farmers of revenue, to Brahmins who did not reside in the village. The village was described in the grant as a “mauje,” a Teluga form of “mauza.” The grant had been recognized by the British Government, and it was admitted that the grantees had not been owners of the kudivaram:—

Held, that having regard to the terms of the grant and the character of the grantors and grantees, the grant was of the land-revenue only; consequently, by the Madras Estates Land Act, 1908, s. 3, sub-s. 2 (d), the village was an estate under that Act, and suits to eject the ryots could not be brought in the Civil Court.

A shrotriyam grant may be of the kudivaram as well as of the melvaram; the statement to the contrary in Wilson's Glossary was based upon decisions which have since been questioned.

The word “mauje” in a Telugu document indicates a village in which there were peasant proprietors owning cultivable lands. Observation to that effect by Sadasiva Ayyar J. in *Venkata Sastrulu v. Sitaramudu* (1914) I. L. R. 38 M. 891, 892 accepted as correct.

The original grant was lost, but there was produced from the custody of respondents, successors to the grantee, a document in Telugu purporting to be a copy of the grant and of a translation of a Persian dumbala of 1765. The document bore an indorsement,

MADRAS TENANCY—continued.

signed by three predecessors of the respondents: "Originals have been retained by us and copies have been filed 1858":—

Held, that the document was properly admitted under the Indian Evidence Act, ss. 65, 96, as secondary evidence of the terms of the grant, the statement in the indorsement authenticating the copy being evidence as a statement by a deceased person in a document relating to a relevant fact, also as an admission by the respondents' predecessors.

Decree of the High Court I.L.R. 46 M. 92 reversed. *SEETHAYYA v. SUBRAMANYA SOMAYAJULU*. 146

2. — Lease before Act—Reservation of Trees—Effect and Duration of Reservation—Dry Pasturage Waste—Covenant to pay increased Rent on Cultivation—Right to Inclusion in Puttah—Estates Land Act (I. of 1908, Mad.), s. 3, sub-s. 16; s. 12.

Where land subject to the Madras Estates Land Act, 1908, was leased before the Act to a ryot who executed a contract by which all rights in trees on the land were reserved to the landholder, the effect of s. 12 of the Act is that the reservation continues as to trees on the land at the passing of the Act during the occupancy rendered permanent by the Act, not merely during the term of the lease; the ryot has the right to use, enjoy, and cut down only trees which after the passing of the Act are planted by him or grow naturally.

There is no provision in the Act enabling a landholder to claim an enhancement of rent or any additional payment for trees the right to which he has lost by the operation of the Act.

Where a lease to a ryot before the Act describes part of the land leased as "dry pasture waste" but provides that if any part of it is cultivated the rent thereon shall be increased to that provided for "cultivation," land, there is not thereby a reservation of that part as pasturage, and, subject to the exceptions in s. 3, sub-s. 16, it is ryoti land which the ryot is entitled to have included in his puttah, even though it has never been cultivated.

Yarlagada Mallikarjuna v. Subbiah (1920) 39 Mad. L. J. 277 distinguished.

Censure of dilatory proceedings and useless costs.

Decree of the High Court reversed as to the effect of s. 12. *BOMMADEVARA NAGANNA NAIDU v. YELAMANCHILI PITCHAYYA*. . . . 346

3. — Right of Permanent Occupancy—Burden of Proof—Long continued Possession at uniform Rent—Alienations—Purchase of Kudivaram.

It is well established that those claiming a right of permanent occupancy must prove that it exists by custom, contract or title, or possibly by other means.

In a suit by a ryotwari pattadar claiming partition of his undivided half share in an estate, the defendants contended that they

MADRAS TENANCY—continued.

had a right of permanent occupancy as to certain well irrigated lands and land under palmyra trees, and that consequently those lands should be excluded from the partition:—

Held, that the defendants, who proved that they had been in undisturbed possession of some of the land for a long period at a more or less uniform rent, and that at a comparatively recent date they had made alienations not of such a kind as ordinarily would be brought to the notice of the pattadar, had not discharged the burden of proof upon them; the fact that some of the defendants had purchased the kudivaram militated against their claim.

Seturatnam Aiyar v. Venkatachala Gounden (1919) L. R. 47 I. A. 76 and *Chidambara Sivaprakasa Pandara v. Veerama Reddi* (1922) L. R. 49 I. A. 286 distinguished on the facts. *SUBRAMANYA CHETTIAR v. SUBRAMANYA MUDALIYAR*. 248

MAHOMEDAN LAW—Gift—Construction of Deed—Gift of Life Interest.

A Sunni Mahomedan of the Hanafi school executed a deed stating that he had made a gift without consideration of his entire property to his wife, subject to the condition that she should remain in possession of a share worth Rs.5000 with full power to alienate it, and that as to the rest, worth Rs.10,000, she should not have power to alienate but should remain in possession for her lifetime, and that after the donee's death the entire property gifted away should revert to named collaterals. Upon the death of the donee her brother claimed the whole property as her heir. He contended that the intention shown by the deed was to make a gift of the whole property itself subject to a restrictive condition, and that under Mahomedan law the gift was valid, but the condition void:—

Held, that upon the true construction of the deed the subject-matter of the gift was a life estate in the whole property together with a power to alienate a third part, and that accordingly the suit failed; it was not necessary to consider whether a gift of a life estate was valid in Mahomedan law, because if it was not the suit equally failed. *AMJAD KHAN v. ASHRAF KHAN*. 213

2. — Marriage—Legitimacy—Continuous Cohabitation—Acknowledgments—Presumption—Clan addicted to Concubinage—Admissibility of Evidence—Absence of Parda.

The son of a Mahomedan by a female servant in his house claimed a declaration of his legitimacy. The parents had continuously cohabited for many years, and the father on several occasions had acknowledged the plaintiff as his son. There was some evidence of a nikah marriage:—

Held, that evidence that other members of the father's clan had illegitimate children by servants was inadmissible to rebut the

MAHOMEDAN LAW—continued.

presumption of legitimacy arising from the acknowledgments and that though the fact that the mother, unlike the father's other wives, was not parda-nishin was one to be considered, it was insufficient to interfere with the presumption of law or the balance of proof of the fact of legitimacy. MOHABBAT ALI KHAN v. MAHOMED IBRAHIM KHAN . . . 201

3. — *Widow's Dower—Construction of Decree—Charge on Husband's Estate.*

The widow of a Shia Mahomedan sued his sole heir and persons interested in alienations made by him, claiming that the alienations were invalid, for a decree for a named sum as her dower, and to recover that sum from the alienated properties. She obtained a decree declaring the amount due to her, and that the properties "be treated as the properties" of the deceased "from which the plaintiff is entitled to recover the decreed amount." After the decree the heir sold two of the properties to purchasers who knew of the decree:—

Held, that the decree upon its true construction created a charge upon the properties for the dower debt, and that the purchasers took subject to that charge. QASIM HUSAIN v. HABIBUR RAHMAN . . . 254

MAINTENANCE—Hindu widow—Widow residing in parental home.

• See HINDU LAW 4.

MESNE PROFITS—*Decree and Plaintiff silent as to future Profits—Mesne Profits recoverable to date of Possession—Suit between Zamindars jointly entitled—Land in khas Possession of Patnidar—Basis on which mesne Profits recoverable—Code of Civil Procedure (Act XIV. of 1882), ss. 211, 212.*

Land to which three families of zamindars were entitled in certain shares became diluviated. On reformation the Government took possession and let it on a patni lease. One of the three families recovered the land from the Government and continued the patnidar in possession. Subsequently members of the other two families sued the family who had recovered the land and the patnidar claiming possession of their shares and mesne profits, which they valued down to the date of the plaint. In 1906 they were decreed possession and mesne profits to be ascertained in execution. The decree was finally affirmed by the Privy Council in 1917. Owing to the appeals the plaintiffs did not obtain possession until 1919:—

Held, (1.) that the plaintiffs were entitled to mesne profits down to the date when they obtained possession; (2.) that the liability of the zamindar defendants under the decree was not joint and several with the patnidar, and under the explanation to s. 211 of the Code of Civil Procedure, 1908, the mesne profits recoverable from them should be based upon the rent they received from the patnidar, not upon the produce value of the land.

MESNE PROFITS—continued.

Decree of the High Court I.L.R. 53 C. 992 reversed on the second point. GURUDAS KUNDU CHOWDHURY v. HEMENDRA KUMAR ROY 290
— Order to pay mesne profits—Not Evidence of possession.
See LIMITATION 2.

MINERALS—*Unenfranchised Service Inam—Finding that Estate held under Grant from Zamindar—Second Appeal—Absence of Proof of Grant of Minerals—Code of Civil Procedure (Act V. of 1908), s. 100.*

The owner, by a purchase in 1879, of twenty-seven villages in the Northern Circars claimed that he was entitled to the underlying minerals. The villages had formed part of an estate held by the vendor's fore-fathers as mansabdars. In or about 1785 the mansabdar had been paying a fixed annual sum to a neighbouring zamindar, and was under an obligation to provide him with 700 peons. In 1802 the zamindari was permanently settled, the annual payment by the mansabdar being treated as among the assets upon which the peisheash was fixed. In 1847, the Government acquired the zamindari, and in 1859 commuted the services for an annual payment. There had been no enfranchisement of the inam. The Subordinate Judge (on appeal from the Munsif) found that the estate was originally held under a grant from the zamindar subject to a fixed rent and an obligation to provide a military force. Upon appeal it was contended that the mansabdars had been independent chieftains and did not take under any grant:—

Held, that the above contention was inadmissible, as there was evidence upon which the finding of the Subordinate Judge could have been based, and that it was therefore binding under the Code of Civil Procedure, 1908, in the second appeal; and as it was not established that the grant by the zamindar included the minerals the suit failed.

Sashi Bhushan Misra v. Jyoti Prashad Singh (1916) L. R. 44 I. A. 46 followed. RAJA OF PITTAPUR v. SECRETARY OF STATE FOR INDIA 223

MORTGAGE—*Construction of Mortgage—Mixed Simple and Usufructuary Mortgage—Mortgagor failing to give Possession—Remedy of Mortgagee—Transfer of Property Act (IV. of 1882), ss. 67, 68 and 98.*

A mortgage executed in 1923 to secure an advance of Rs.30,000 and interest stated by clause 2 that a half share in certain villages had been hypothecated in lieu of the principal and interest, and that in order to pay the interest possession had been delivered to the mortgagee; clause 3 provided that the principal was to be repaid within thirty-five years; clause 4, that the mortgagors should remain entitled to eject tenants, to enhance rents, to cultivate the land and to issue leases, and that if there should be a surplus

MORTGAGE—*continued.*

after paying the interest it should be applied to paying the principal; clause 5, that if at the appointed time the mortgagors should not repay, the mortgagees should have power to realize the sum due by sale; clause 7, that if the mortgagees were deprived of possession then the liability should rest with the mortgagors. The Rs.30,000 was duly advanced, but the mortgagors failed to deliver possession of the mortgaged property. In 1924 the mortgagee sued to realize the sum due by sale, or for a money decree:—

Held, that the mortgage, upon its true construction, was not an anomalous mortgage to which s. 98 of the Transfer of Property Act, 1882, applied, but was a mixed simple and usufructuary mortgage; that the money owing had become payable by s. 68 by reason of the failure to give possession, and that consequently the mortgagee had a right under s. 67 to a decree for sale. **NARSINGH PARTAB v. MOHAMMAD YAKUB** 299

2. — *Redemption*—*Provision for Redemption of Properties separately*—*Deficiency in Sum advanced*—*Proportionate Reduction on separate Redemption*—*Redemption by Purchaser*—*Lis Pendens*—*Revenue paid by Mortgagees*—*Transfer of Property Act (IV. of 1882)*, ss. 52, 83.

Several properties were mortgaged together in 1905, the consideration being stated to be an advance of Rs.35,000; the mortgagors agreed to pay a fixed annual sum as interest and the Government revenue. By the deed the properties could be redeemed separately on payment of a sum specified for each, provided that all interest on the whole mortgage had been paid or tendered. The sum actually advanced was only Rs.30,984. In 1910 the mortgagees obtained a decree for interest, and in 1912, while an appeal by the mortgagees was pending, the mortgagors sold two of the properties. On appeal the decreed amount was increased by adding interest pending the suit. The purchasers deposited money in Court under the Transfer of Property Act, 1882, s. 83, with a view to redemption of the purchased properties. Upon an issue whether the deposit was sufficient:—

Held, (1.) that, both on general principles and under s. 52 of the Transfer of Property Act, the purchasers were liable in respect of the increase in the amount for interest decreed on appeal.

(2.) That though the sums specified as payable on redemption of the separate properties, and the annual sum fixed for interest, could properly be reduced in proportion to the deficiency in the sum advanced, Government revenue paid by the mortgagees could not be so reduced, as they were entitled to deduct it (with interest thereon) from any interest received by them, and to credit in account only the balance.

(3.) That consequently the deposit was insufficient. **SHIB CHANDRA v. LACHMI NARAIN** 339

MORTGAGE—*continued.*

— *Redemption by reversioner*—*Mortgaged property transferred by mortgagee*—*Indian Limitation Act (IX. of 1908)*, Sch. I., arts. 134, 140. *See LIMITATION 4.*

OUDH TALUQDARI ESTATE—*Will of Taluqdar*—*Mahal placed under Act of 1900 after Will but before Death of Testator*—*Devise of bare life Interest to Daughter in law*—*Validity under Act of 1900*—“*Stranger*”—*Exclusion of statutory Heirs*—*Oudh Settled Estates Act (II. of 1900, U. P.)*, s. 18.

In 1907 a taluqdar, entered in lists 1 and 2 under the Oudh Estates Act, 1869, s. 8, executed and registered a will by which he devised the whole of his property to his widow for her life, and subject thereto to his daughter in law for her life, in both cases without power in any way to dispose of or incumber any part of it, the property to descend subsequently to the then living heirs under the Act of 1869. In 1908 the taluqdar made an irrevocable declaration under the Oudh Settled Estates Act, 1900, ss. 11, 12, that in future a mahal, part of his taluqdar estate, should be held under that Act; that declaration was pursuant to an application for permission made before the execution of the will, and was recited therein. The testator died in 1913. Upon the death of his widow the validity of the devise of the mahal to his daughter in law was disputed:—

Held, that the devise was invalid under the proviso to s. 18, sub-s. 2, of the Act of 1900 as it was not “according to this Act,” in that it was of a bare life interest without the incidents attached to the statutory estate thereby created; effect could not be given to it as a gift of the profits for life, as that would be to subject the estate to a charge or incumbrance which was contrary to the proviso.

It was unnecessary to determine whether (as held by the Chief Court) the devise was also invalid under the proviso as being to a “stranger so as to exclude from succession any person belonging to any of the classes specified in s. 22 of the Oudh Estates Act, 1869.” Observations as to the meaning and effect of that provision.

Decree of the Chief Court (I. L. R. 2 Luck. 97) affirmed. **KRISHNA KUMARI DEVI v. BHAIYA RAJENDRA SINHA** 156

PARTNERSHIP—*Dissolution*—*Notice of Dissolution*—*Retired Partner*—*Liability to old Customers*—*Indian Contract Act (IX. of 1872)*, s. 264.

When after a dissolution of partnership the business is continued in the same firm name, a partner who has retired at the dissolution is liable upon a contract made by the new firm with a person who has previously dealt with the old firm unless that person has received notice of the dissolution, even though public notice by advertisement has been given.

The above rule of English partnership law having been recognized in India before the

PARTNERSHIP—continued

Indian Contract Act, 1872, the provisions of s. 264 of that Act cannot be held to provide otherwise merely by implication, especially as decisions in India dating from 1882 have decided that it has not that effect.

Chundee Churn Dutt v. Edutjee Cowasjee Bijnee (1882) 1. L. R. 8 C. 678 approved.

Although the Indian Contract Act, 1872, deals with partnership in a separate chapter, its provisions are not exhaustive of the law upon that subject.

Irrawaddy Flotilla Co. v. Bugwandas (1891) L. R. 18 I. A. 121 applied. *JWALADUTT PILLANI v. BANSILAL MOTILAL* . . . 174

PRE-EMPTION—Decree obtained by Co-sharers jointly—Effect of Decree—Death of one Plaintiff pending Appeal—Failure to join Representatives—Reversal of Decree—Abatement—Rights of Representatives.

Where plaintiffs obtain a joint decree for pre-emption, without any adjudication under Order xx., r. 14 (2.), of their respective rights, they each have the right to pre-empt the whole property. If one of them dies pending an appeal, and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money in Court is paid over to the defendant with the consent of the surviving plaintiffs.

A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.

Judgment of the High Court, I. L. R. 47 A. 100, varied. *WAJID ALI KHAN v. PURAN SINGH* 80

2.—Waiver of Right to pre-empt—Offer to sell declined—Absence of Notice of intended sale—“Village community”—Oudh Laws Act (XVIII. of 1876), ss. 7, 9, 10.

In 1872 the Government granted to a single grantee a large tract of waste land, which was later constituted a separate village. On the grantee's death the village passed to his devisees, who resided in England. Through their local agent they offered the village for sale, divided into blocks at fixed prices. The appellant having purchased a block and registered the conveyance claimed to pre-empt, under the Oudh Laws Act, 1876, s. 9, other blocks which had been purchased by the respondents severally under agreements completed at a later date. It appeared that the appellant knowing the fixed prices had definitely told the vendors' agent that he did not wish to buy any other block, and that he had acquiesced in an oral agreement already made for the sale of some of the blocks to one of the respondents:—

Held, that if the appellant had a right to pre-empt he had waived it by his conduct, even though no formal notice of an intention to sell was given to him under s. 10 of the Act.

Bhagwat Singh v. Saiyad Nasir Husain (1902) 5 Oudh Cases, 395, followed in later Oudh decisions, approved.

PRE-EMPTION—continued.

Quaere (1.) whether the devisees of the grantee constituted a “village community” within the meaning of the Oudh Laws Act, 1876, s. 7; (2.) whether a registered conveyance entitles a purchaser to pre-empt land the subject of a sale already completed, but unregistered.

Decree of the Chief Court affirmed. *PATESHWARI PARTAB NARAIN v. SITA RAM* 356

PRINCIPAL AND AGENT—Money entrusted to Agent—Suit for Account—Agent setting up Right of third Person.

An agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute his principal's title, unless he proves a better title in a third person and that he is defending on behalf, and with the authority, of that third person. *BHAWANI SINGH v. MAULVI MISBAH-UD-DIN*.

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PROBATE—Will—Onus of Proof—Will prepared under Suspicious Circumstances—Severable Provisions invalid—Grant of Probate as valid Portion.

In all cases in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator, it is for those who propound the will to remove that suspicion, and it is only when that has been done that the onus is thrown on those who oppose the will to prove fraud or undue influence. The above principle is not confined to cases in which the will has been prepared by a person who takes a pecuniary benefit under it.

Tyrrell v. Panton [1894] P. 151 applied.

Where the suspicion arises only as to one particular provision which is severable, and that suspicion is not removed, the Court can admit the rest of the document to probate.

Rhodes v. Rhodes (1882) 7 App. Cas. 192 applied. *SARAT KUMARI DEBI v. SAKHI CHAND* 62

RECORD-OF-RIGHTS.

See BENGAL TENANCY 2.

REGISTRATION—Authority to adopt—Presentation for Registration—Representative of adoptive Son—Guardian—Natural Father—Indian Registration Act (III. of 1877), ss. 3, 32, 40, 41.

The provision in s. 40 of the Indian Registration Act, 1877, that an authority to adopt may be presented for registration, after the donor's death, by the donee or the adoptive son, does not exclude the authority, under s. 32, of the representative of the adoptive son to present the document. The definition of the representative of a minor in s. 3 does not preclude a person who is not his appointed guardian from being his representative.

An authority to adopt was presented for registration by the adoptive son's natural father, who was then his nearest male agnate, treating the son as having passed

REGISTRATION—continued.

into the adoptive family. Registration was effected, the registering officer having satisfied himself, as required by s. 41, that the person presenting was entitled to do so according to s. 40, and it not having been objected that he was not so entitled:—

Held, that the document was duly registered, since the natural father, as the adoptive son's nearest male agnate, was the proper person to act as his natural guardian in the absence of any guardian judicially appointed; further, that any doubt upon the facts was removed by the certificate of the registering officer.

Quaere, whether in the case of an adoptive son of tender years residing with his natural father, the natural father is not, in the absence of a guardian, his representative, even when he is not his nearest male agnate in Hindu law.

Decree of the High Court I. L. R. 43 M. 288 affirmed. *VENKATAPPAYYA v. VENKATA RANGA ROW.* 21

2. —Registration of Document not duly stamped—Error of Procedure—Good Faith—Validity of Registration—Transfer to defeat Creditors—Preference of one Creditor—Transfer of Property Act (IV. of 1882), s. 53—Indian Stamp Act (II. of 1899), ss. 35, 37—Indian Registration Act (XVI. of 1908), s. 87.

Registration of an instrument not duly stamped, contrary to s. 35 of the Indian Stamp Act, 1899, is an error of procedure, not an act done without jurisdiction; consequently if it is done in good faith the registration is valid under s. 87 of the Indian Registration Act, 1908, and upon payment of the proper duty and penalty the instrument is admissible in evidence.

Mujibunnissa v. Abdul Rahim (1900) L. R. 28 I. A. 15 distinguished.

Sarada Nath Bhattacharya v. Gobinda Chandra Das (1919) 23 Cal. W. N. 534 approved.

Where an instrument bears a stamp which is of sufficient amount but is surcharged as a Court fees stamp, the stamp is "of improper description" within s. 37 of the Indian Stamp Act, 1899, and the remedial provisions of the rules made thereunder apply.

Reference under s. 57 of Act II. of 1899 (1901) I. L. R. 23 A. 213 disapproved so far as it concerns court fees stamps in their present form.

A mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under s. 53 of the Transfer of Property Act, 1882, as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property.

Musahar Sahu v. Hakim Lal (1915) L. R. 43 I. A. 104 followed.

REGISTRATION—continued.

Judgment of the High Court reversed as to s. 53 of the transfer of Property Act. *MA PWA MAY v. S. R. M. M. A. CHETTYAR FIRM* 379

3. —Specific Performance — Unregistered Sale Deed—Admissibility in Evidence—Indian Registration Act (XVI. of 1908), s. 17, sub-s. 1 (b); s. 49.

A document which upon its true construction is a sale deed, purporting to transfer an interest in immovable property of the value of Rs.100 and upwards, is precluded by s. 49 of the Indian Registration Act, 1908, from being admitted in evidence in a suit for specific performance of the agreement to transfer said to be contained therein unless it is registered in accordance with the Act.

Sanjib Chandra Sanyal v. Santosh Kumar Lahiri (1921) I. L. R. 49 C. 507; *Satyanarayana v. Chinna Venkata Rao* (1925) I. L. R. 49 M. 302; and *Ramling Parwatayya v. Bhagwant Sambhuappa* (1925) I. L. R. 50 B. 334 approved. *SKINNER v. SKINNER* 363

SALE FOR REVENUE — Permanently settled Estate—Adverse Possession as to Part of Estate—Rights of Purchaser—Estoppel—Party to Partition claiming Land decreed to another Party—Evidence—Thak Statements—Bengal Land Revenue Sales Act (XI. of 1859), s. 37—Transfer of Property Act (IV. of 1882), s. 43.

The executors of a deceased Hindu sued the widow of his brother for possession of land which the decree in a partition suit of 1898 had allotted to her, other family properties being thereby allotted to the brother since deceased. In 1908 he purchased a permanently settled estate at a sale under Act XI. of 1859 for arrears of revenue. The evidence showed that the land in suit had formed part of that estate at the permanent settlement, though by adverse possession it had become the property of the joint family, and had been so partitioned:—

Held, that as there had been no separate assessment of the land in suit it remained liable to be sold under s. 37 of the Land Revenue Sales Act, 1857, for arrears of revenue on the whole estate, and that the fact that it had been allotted to the widow by the partition decree did not estop the executors from claiming it by virtue of the purchase; it was not shown that at the time of the partition the brother, since deceased, had made any representation to the widow so as to bring s. 43 of the Transfer of Property Act, 1882, into operation.

Surja Kanta Acharjya v. Sarat Chandra Roy Chowdhuri (1914) 18 Cal. W. N. 1281 (P. C.) followed.

Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan (1919) 24 Cal. W. N. 321 (P.C.) distinguished.

Held, further, that in determining whether the land in suit had formed part of the permanently settled estate at the permanent

SALE FOR REVENUE—continued.

settlement that statements were admissible and of evidentiary value.

Jagdeo Narain Singh v. Baldeo Singh (1922) L. R. 49 I. A. 399, 407 explained. *KRISHNA PROMADA DASI v. DHIRENDRA NATH GHOSH.* 74

SALE IN EXECUTION—Benami Purchase—Real Purchaser obtaining Title by adverse Possession—Dispossession by Transferee from Benamidar—Code of Civil Procedure (Act V. of 1908), s. 66—Indian Limitation Act (IX. of 1908), s. 28, Sch. I., art. 144.

If after an auction sale of immovable property in execution of a decree the real purchaser has for twelve years possession adverse to the certified purchaser, his benamidar, and is then dispossessed by a transferee of the certified purchaser, he can sue for possession on the title acquired by him under the Indian Limitation Act, 1908, s. 28, and Sch. I., art. 144, and need not aver or prove that the auction purchase was made for him; s. 66 of the Code of Civil Procedure, 1908, therefore, does not apply in that case.

It was unnecessary to decide whether the High Court had rightly held that in the case of a sale and transfer before 1909, s. 66 of the Code of 1908, and not s. 317 of the Code of 1882, applied.

Decree of the High Court I. L. R. 43 A. 416 varied. *ABDUL JALIL KHAN v. OBAID ULLAH KHAN.* 330

SERVICE TENURE—Grant by Desai—Shet Sanadis—Services outside Village in which Lands granted.

In 1770 and 1837 desais, the appellant's ancestors, granted to the respondents' ancestors lands in one of their watan villages on service tenure. The nature of the services to be rendered, and whether they were confined to services in the village, did not appear from the grants. There was however evidence of a Government inquiry, presumably under Act XI. of 1852, in which the respondents' ancestors were found to be shet sanadis holding from the desais:—

Held, having regard to the military nature of the services formerly rendered by shet sanadis, and the oral evidence of the services actually rendered since 1873 by the first respondent and his father, that the services to be rendered were not confined to services in the village. *LAKHAMGOWDA v. APPANNA* 44

SPECIFIC PERFORMANCE—Pecuniary Compensation an adequate Remedy—Assessment of Compensation—Conclusiveness of Findings in second Appeal—Code of Civil Procedure Act (V. of 1908), ss. 100, 101—Specific Relief Act (I. of 1877), ss. 12 (c), 21 (a).

In consideration of Rs. 5000 advanced by the appellant to enable the respondent to prosecute an appeal to the Privy Council, the

SPECIFIC PERFORMANCE—continued.

respondent agreed in writing that if the appeal were successful he would sell a village to the appellant for the sum advanced. The appeal having succeeded, the appellant sued for specific performance. The District Judge found (reversing the trial Court) that the bargain was not extortionate or harsh, and directed the execution of a sale deed. He found also, however, that Rs. 20,000 compensation would have been an adequate remedy. Upon a second appeal the bargain was found to be unconscionable, and a decree was made for Rs. 11,555. It was not contended in India that it was probable that pecuniary compensation could not be got:—

Held, that there being evidence in support of the above findings of the District Judge the Code of Civil Procedure, 1908, ss. 100, 101, made them binding in second appeal, and that, as he had found that pecuniary compensation would be an adequate remedy, the Specific Relief Act, 1877, ss. 12, 21, precluded a decree for specific performance; but that the decree should have been for Rs. 20,000, the amount at which he had assessed the compensation with interest. *RAMJI v. RAO KISHORESINGH* 280

— Unregistered sale deed—Inadmissibility of evidence.

See REGISTRATION 3.

STAMP—Registration of document not duly stamped.

See REGISTRATION 2.

TRADE MARK—Passing Off—Colourable Imitation—Deception of illiterate Persons—Trade Name associated with Mark—Damages.

The respondents dealt largely in Indian cloths, and in connection with sales thereof used a trade mark in which the lotus flower was the leading feature, and their cloths had become known as "lotus cloth." The appellants made and sold cloths upon which they used marks which would be apt to be confused with the respondents' mark by illiterate and unobservant people, and to be accepted by purchasers wishing to buy "lotus cloth." The respondents brought a suit against the appellants for passing off; they claimed damages, giving up a claim to an account of profits. The High Court held the appellants liable. In assessing damages the Court assumed that 60 per cent. of the sales made by the appellants of goods bearing the offending mark were due to the use of that mark, and awarded the respondents 9 per cent. of the sale price of the 60 per cent. as the profit thereon lost to the respondents:—

Held, that in the circumstances above stated the respondents' cause of action was established; but that the assumption made in assessing the damages was far too speculative. Though no definite rule could be laid down for estimating the damages in such a case it would be safer to award a sum representing the profit (at 9 per cent.) upon the falling off in the respondents' sales after the

TRADE MARK—*continued.*

offending mark was used, together with a sum representing the profit upon an increase which might have taken place in their trade.

Johnston v. Orr-Ewing (1882) 7 App. Cas. 219 applied.

Judgment of the High Court, I. L. R. 49 A. 92, varied as to damages. *JUGGI LAL-KAMALAPAT v. SWADESHI MILLS Co., LTD.* 1

WILL—Bequest of absolute estate subject to restrictions.

See HINDU LAW.

WORDS AND PHRASES:—

- “Application”: *See EXECUTION DECREE.*
- “Jotedar”: *See EVIDENCE 2.*
- “Mauje”: *See MADRAS TENANCY 1.*
- “Shet sanadi”: *See SERVICE TENURE.*
- “Stranger”: *See OUDH TALUQI ESTATE.*
- “Village community”: *See FARMERS' EMPTION 2.*

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